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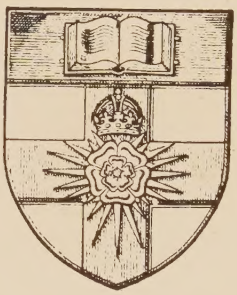

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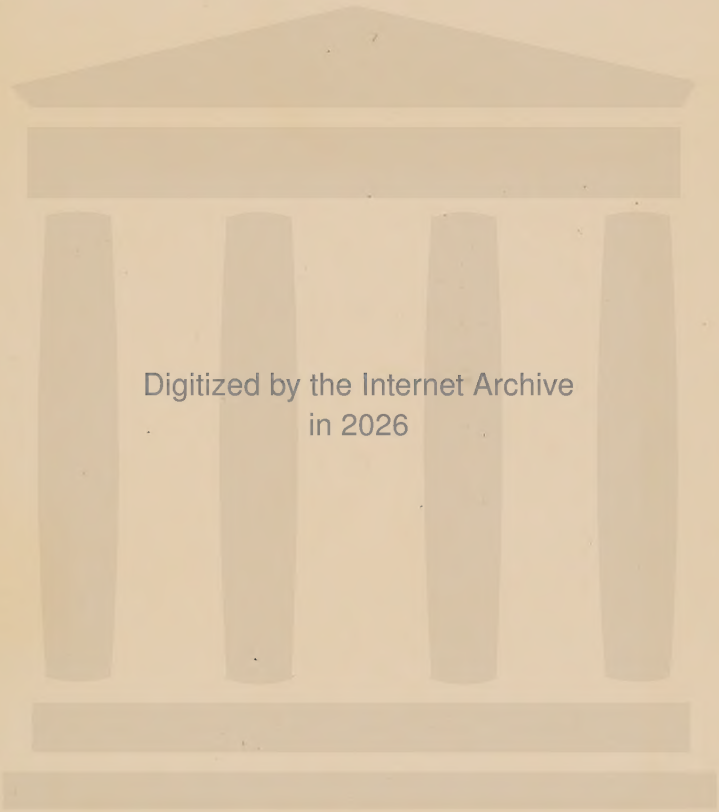
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# CASES

DETERMINED BY THE

# KING'S BENCH DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

# COURT OF CRIMINAL APPEAL

AND BY THE

# RAILWAY AND CANAL COMMISSION.

---

[IN THE COURT OF APPEAL.]

C. A.
1916
*March* 16.

## DENNIS *v.* A. J. WHITE & CO.

*Employer and Workman—Compensation—Accident arising out of and in Course of Employment — Workman directed to ride Bicycle on Employers' Business — Street Risk — Special Danger — Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Where a workman in the course of his employment was required to ride a bicycle belonging to his employers through the streets of London on an average once a day, and while so doing was knocked down and injured by a motor car :—

*Held* by Lord Cozens-Hardy M.R. and Phillimore L.J., Sargant J. dissenting, (1.) that the accident did not arise out of the employment, but was something which might happen to any ordinary member of the public riding a bicycle in the streets, and (2.) that the question whether the accident did or did not arise out of the employment was one of fact upon which the decision of the county court judge was final.

APPEAL from an award of the judge of the Westminster County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

C. A. 1916

DENNIS v. A. J. WHITE & Co.

The applicant was employed by the respondents, a firm of builders carrying on business in Westminster, in the capacity of a plumber's mate. In the course of his employment it was his duty to go upon errands to different parts of the town, and on such occasions he was directed to use a bicycle belonging to the firm. He did this upon an average about once a day. On August 27, 1915, he was ordered to go on the bicycle to fetch some plaster, and as he was crossing Sloane Square he collided with a motor car and was knocked down and one of his legs was broken. On October 14, 1915, he commenced these proceedings for compensation under the Act.

The county court judge held that the accident did not arise out of the employment and made his award in favour of the respondents. The applicant appealed.

*C. T. Williams*, for the appellant. This comes within the principle of *M'Neice* v. *Singer Sewing Machine Co.* (1) and *Pierce* v. *Provident Clothing and Supply Co.* (2) rather than that of *Sheldon* v. *Needham* (3), from which it is entirely distinguishable. Here the applicant was directed to use the bicycle on the business of the firm. It cannot reasonably be said that a boy who is required by his employers to ride on a bicycle through the crowded streets of London is not subjected to a special risk beyond that of ordinary members of the public. This is a stronger case than *Pierce* v. *Provident Clothing and Supply Co.* (2) A momentary exposure to the danger, as in *Hadwin* v. *Shepherd* (4), is a very different thing to what is proved in the present case. [*Trim Joint District School Board* v. *Kelly* (5), *Martin* v. *Lovibond & Sons* (6), and *Bett* v. *Hughes* (7) were also referred to.]

*Shakespeare*, for the respondents. It is quite clear that this is a question of fact upon which this Court will not interfere with the finding of the learned county court judge: *Clayton* v. *Hardwick Colliery Co.* (8) In *Slade* v. *Taylor* (9) Lord Cozens-Hardy M.R. said an accident arising in the course of an employment, and while

(1) 1911 S. C. 12.
(2) [1911] 1 K. B. 997.
(3) (1914) 7 B. W. C. C. 471.
(4) [1915] W. C. & Ins. Rep. 503.
(5) [1914] A. C. 667.
(6) (1914) 7 B. W. C. C. 243.
(7) (1914) 8 B. W. C. C. 362.
(8) (1915) 9 B. W. C. C. 136, 139.
(9) (1915) 8 B. W. C. C. 65, 67.

the employee is doing something which he has been directed to do, does not entitle him to compensation, unless he can also say that he was exposed to some special danger and incurred a risk greater than would be run by a member of the general public. If that be the principle, the question is one for the county court judge, and he has rightly decided it in this case.

[He was stopped by the Court.]

*C. T. Williams* in reply. Here the facts are undisputed. The inference to be drawn from them is a question of law: *Trim Joint District School Board* v. *Kelly* (1); *Gane* v. *Norton Hill Colliery Co.* (2) *Slade* v. *Taylor* (3) is no more against my contention than *Hadwin* v. *Shepherd.* (4) There the accident resulted from a side-slip and had nothing to do with the dangerous nature of the traffic through which the boy had to ride. It was no part of his duty to ride the bicycle. He was going home on it, and the machine side-slipped and brought about the accident.

LORD COZENS-HARDY M.R. In my opinion this appeal fails. I think that in this case, having regard to what Lord Loreburn said in *Clayton* v. *Hardwick Colliery Co.* (5), it is a question of fact whether this accident did or did not arise out of the employment of the workman. The learned county court judge is the person to whom alone that question of fact is left, and I see no misdirection on the part of the learned judge in finding as he did. But I do not wish to leave the matter there. I wish to say, as I am afraid I have said several times before, what in my view has been, by a long series of authorities, held to be the proper test as to the meaning of those words "arising out of." I rather prefer to deal with a case in the House of Lords which has not been mentioned at all, namely, *Plumb* v. *Cobden Flour Mills Co.* (6) There Lord Dunedin elaborately discussed this question in a judgment in which all the Lords present concurred. Dealing with the various tests which are applied to these cases, he said: "One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment?" Then he says: "As regards the first branch,

(1) [1914] A. C. 667.
(2) [1909] 2 K. B. 539, 542.
(3) 8 B. W. C. C. 65.
(4) [1915] W. C. & Ins. Rep. 503.
(5) 9 B. W. C. C. 136, 138.
(6) [1914] A. C. 62, 68.

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I think the point is very accurately expressed by the Master of the Rolls in *Craske* v. *Wigan* (1), where he says: 'It is not enough for the applicant to say "The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." He must go further, and must say "The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger."' As regards the second branch, a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself." Those observations of Lord Dunedin seem to me to sum up a long line of authorities. If, however, one wants to go further, and to deal with a still more recent authority, *Slade* v. *Taylor* (2) seems to be really an a fortiori case. There the accident happened to a man riding on a bicycle, and it was due to something incidental to travelling by bicycle. We all thought that we were bound by authority to say that that was not an accident arising out of the employment, but something which might happen to any member of the public who was riding a bicycle in that way. Then it is said that that case does not apply here because the man there was not told to use the bicycle, but only had permission to do so. That point, too, is expressly covered by what I have said in another case. I am sorry to quote my own judgments upon these points, but I have given so many judgments on this branch of the law that it is unavoidable. In *Pierce* v. *Provident Clothing and Supply Co.* (3) I referred to *M'Neice* v. *Singer Sewing Machine Co.* (4) and said: "But then it is said that in the Scotch case the man was directed to go on a bicycle. I can see nothing in that point. If I tell a man to go on an errand I do not direct him to walk. If I know that he uses any particular mode of locomotion and do not prohibit it, it seems to me unimportant whether I direct him to use that particular mode or whether I permit him." That suggested point of distinction seems to me not in the least to avail the appellant.

In my opinion the appeal fails, both upon the ground that it relates to a question of fact, upon which the learned county court

(1) [1909] 2 K. B. 635.
(2) [1915] W. C. & Ins. Rep. 53.
(3) [1911] 1 K. B. 997, 1001.
(4) 1911 S. C. 12.

judge's decision is final, and upon the ground that, even if it does not relate to a question of fact, his decision is in accordance with the previous decisions of this Court, and, I think, of the House of Lords too, which bind us to hold that the accident was not one arising out of the employment.

PHILLIMORE L.J. I am of the same opinion. If this is a matter of pure fact the learned county court judge has found against the applicant, and his decision must stand. If it is a point of law, or mixed fact and law, there are a series of decisions which conclude this matter. Out of many I will just mention by name those which I think nearest in point—*Sheldon* v. *Needham* (1), *Slade* v. *Taylor* (2), and *Hadwin* v. *Shepherd* (3), and the case in which we gave judgment only yesterday, *Chapman* v. *Owners of the Ship John W. Pearn.* (4) I think that those decisions show that unless the man's ordinary employment brings him so constantly into the streets as to expose him, by reason of his employment, to a special danger from street risks—what one might call the cumulative street risk—then the risk which he undertakes is an ordinary street risk shared by him with ordinary members of the public. It is not an accident arising out of the employment if the man is proceeding in a vehicle, whether under orders or lawfully without orders, in the part of the street where vehicles ordinarily travel, although he may be thereby more exposed to contact with other vehicles than if he were walking. I think that the decisions further show that although there are peculiar dangers inherent to travelling on a bicycle, such as a side-slip, or possibly an increased liability to collision, it is none the less the kind of vehicle which ordinary members of the public use, even in the streets of London, and is not to be regarded as a specially dangerous vehicle. Upon those grounds I think this appeal fails.

SARGANT J. In this case I have the misfortune to differ from the other members of the Court and from the learned county court judge. In saying that I need hardly add that most probably I am wrong; but it seems to me that this is a case where one has to look

(1) [1914] W. C. & Ins. Rep. 274.
(2) [1915] W. C. & Ins. Rep. 53.
(3) [1915] W. C. & Ins. Rep. 503.
(4) [1916] W. C. & Ins. Rep. 47.

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first at the particular facts and not to go to the facts of other cases for the purpose of forming a judgment. Here the boy in question was employed by builders whose works were in Westminster in the centre of London, and it was part of his duty to go on an average once a day on a bicycle belonging to the firm for the purpose of getting materials, or doing other errands on the business of the firm. In the course of riding in the middle of the town, in Sloane Square, his bicycle was knocked down by a motor car, and he was injured. The question is whether that arises out of the employment. That it arises in the course of the employment is, of course, clear, because he was actually directed by his employers to go upon this ride by bicycle.

The test which is always applied is the test that was laid down by Collins M.R. in *Andrews* v. *Failsworth Industrial Society* (1) as to whether there is, in a particular vocation, some risk appreciably and substantially beyond the ordinary normal risk which ordinary people run. I have to ask myself whether, having regard to the known conditions of traffic in London, with large numbers of motor cars and motor buses about the streets, a matter of which the Court can of course take judicial notice, there was any appreciable extra danger incurred by this boy when he was sent on a bicycle through the streets of London once a day on an average. In my opinion that question must be answered in the affirmative, assuming for the moment, as I do, that the question can be dealt with and by this Court, and is not one for the learned county court judge, a matter I will deal with later.

It has been held by the Court that the risk of treading on a piece of orange peel in the street is not an extraordinary risk, and the same was held in a case where a manager at Wandsworth went on his own bicycle once a week for a short time to get books together, or something of that kind; but the fact that those circumstances have not been held to constitute an appreciable extra danger seems to me really to afford no help in considering whether, in this case, there was an appreciably greater danger. It seems to me, if one case is to be compared to another, that the extra danger which this lad ran through riding a bicycle once a day through the middle of London was far greater than the extra danger of injury

(1) [1904] 2 K. B. 32.

by lightning that the man in *Andrews* v. *Failsworth Industrial Society* (1) ran through having to conduct his work on top of a scaffold, or than the extra danger which the brewer's drayman ran in *Martin* v. *Lovibond & Sons* (2), because he had two or three times a day, in the ordinary course of his employment, to get down and cross the road in order to obtain reasonable refreshment. But, however that may be, the question is simply and solely one to be judged by itself; and I think that many ordinary people would be startled to hear it said that any one who was bound once a day to ride a bicycle through the streets of central London did not incur any appreciable extra risk. So much for that question, assuming it to be one which it is for this Court to determine.

On the second point, as to whether it is a question of fact for the learned county court judge, or a question of law, or a question of mixed fact and law, I feel the greatest difficulty. No doubt there is the view of Lord Loreburn which has been mentioned by the Master of the Rolls; but there is also the view of Lord Dunedin in the recent case of *Trim Joint District School Board* v. *Kelly* (3) that, where all the facts are undisputed, the inferences to be drawn are probably inferences of law, or, at any rate, inferences of mixed law and fact; and of the two views the latter is the one which would commend itself to me. However, having regard to the view taken by the other members of the Court, my opinion becomes of no importance.

Solicitors for appellant: *Berry, Tompkins & Co.*
Solicitors for respondents: *William Hurd & Son.*

(1) [1904] 2 K. B. 32. (2) [1914] W. C. & Ins. Rep. 76.
(3) [1914] A. C. 667.

G. A. S.

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1916

*March* 17, 20.

[IN THE COURT OF APPEAL.]

## JACKSON *v.* HUNSLET ENGINE COMPANY, LIMITED.

*Employer and Workman—Compensation—Review—Termination—Incapacity—Loss of Eye—Suitable Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1 ; *Sched. I., par.* 3.

The employers of a man who had lost an eye by accident arising out of and in the course of his employment in their service alleged that his incapacity had terminated, and they ceased to pay compensation to him. He applied for compensation, and the employers offered a suspensory award. The county court judge was of opinion that the incapacity had terminated and refused to make any award. The Court of Appeal sent the matter back to the judge to make an award and to consider for this purpose whether the work offered to the applicant by the employers was suitable. The judge held, on the ground, inter alia, of the unusual risk which would be run by a one-eyed man, that the offered employment was not suitable and awarded full compensation :—

*Held*, on appeal, that suitability was a question of fact ; that there was sufficient evidence to justify the finding that the work was not suitable without reference to the extra risk ; and (*semble*) under the direction given in the first appeal that the learned judge was right in taking the extra risk run by a one-eyed man into consideration.

Appeal from an award of the judge of the Leeds County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On March 28, 1914, George Jackson, whilst working in the employment of the Hunslet Engine Company, met with an accident which caused the loss of his left eye. In December, 1914, the company's doctor reported that he was fit to do his old work, whereupon they ceased payment of compensation. The workman denied this, but offered to do light work. The matter came before the county court judge on arbitration proceedings, when he held that the man could do his old work and dismissed his application, refusing to make a declaration of liability, although it was offered by the company. The applicant appealed, and an order was made directing a new trial, that a declaration of liability should be made, and the suitability of the work offered to him should be inquired into. The

case is reported 8 B. W. C. C. 584. The case came again before the learned county court judge, when his Honour held that Jackson's position in the labour market would be detrimentally affected by the accident although he was able to do the work; he made a suspensory award, and added: "The further question then arises, What is suitable work? And in this case was the old work, which was and still is offered to him by the respondents, work which he was bound to accept under the penalty of forfeiting his compensation? I think he can do the work to the sufficient satisfaction at all events of the respondents, who offer it, but I also think he will do it at the very imminent risk of the great calamity of losing his remaining eye by a second accident and being rendered totally blind. It would be done under surroundings of flying splinters of metal, which obviously renders it highly dangerous to the eyes. Many grave reasons present themselves for thinking that a highly dangerous employment by reason of having only one eye cannot be deemed a suitable one to a one-eyed man, even though the danger lies rather in the exceptional seriousness of the consequences of a further accident to the particular individual (as in the case of a man with only one eye to serve him) than in the likelihood and seriousness of a second accident if it stood by itself. After considering the cases on this subject (some of which seem to deal with it under the aspect that this physical disability has ceased, and a suspensory award recognizing that partial disability continues has not been given) I think I am at liberty to deal with the matter of 'suitability' as a question of fact and to keep in view all the circumstances and dangers of every kind which attend it, and I have no difficulty in coming to the conclusion that his old work still offered to Jackson by the respondents is not suitable and that he is not bound to accept it. There will be an award therefore for him for his full compensation."

The employers appealed on the grounds—

(1.) That the learned judge misdirected himself in holding that he was entitled in considering the suitability of the work offered to take into account and rely upon the exceptional seriousness of the consequences of a further accident to the particular individual.

(2.) That the learned judge was wrong in law in holding that the exceptional seriousness of the consequences of a further accident

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to the applicant by reason of his being a one-eyed man rendered the offer of his old work an offer of unsuitable work.

(3.) That there was no evidence proper to be considered to justify the learned judge in holding that the work offered was unsuitable.

(4.) That there was no evidence before the Court to indicate that the risk of injury to the remaining eye at such work was increased in any way by the loss which he had already sustained of one eye.

(5.) That the learned judge misdirected himself and was wrong in law in holding that the disablement continued and involved an admission of partial incapacity.

(6.) That apart from such last-mentioned holding the question of the suitability of the work offered did not arise.

*A. Parsons, K.C.*, and *Harold Morris*, for the appellants. The point in this case is whether, in considering the question whether work which is offered to a workman who has lost one eye from an accident arising out of and in the course of his employment is suitable within Sched. I., par. 3, of the Act, it is proper for the arbitrator to take into consideration the possibility of a second accident having regard to the fact that the workman is a one-eyed man. The county court judge has taken that fact into consideration, and the appellants contend that in doing so he has misdirected himself. They say that he may properly regard the question whether the fact of the particular injury has rendered the risk of subsequent injury more probable, but if the workman is physically able to do his old work, then it is not relevant to take into consideration possible hypothetical results which may not ensue. The county court judge has found that the workman was able to do his old work, but he refrained from considering the question under Sched. I., par. 3, on the ground that that only applies during the period of the workman's incapacity. It is clear that the consideration which solely influenced the county court judge was the serious consequences of the possible future loss of the man's remaining eye. The principle was established in *Hargreave* v. *Haughhead Coal Co.* (1) that unless there is causal connection between the accident and the apprehended future incapacity the arbitrator has no right to take into consideration the possible seriousness of a hypothetical injury which it is feared may ensue,

(1) [1912] A. C. 319.

unless the effect of the accident is to make the man more liable to meet with a second accident. If the county court judge is right in his reasons, then if a man has lost one or two fingers it might be said that he could not be called upon to do his old work, because if he should sustain a further injury he might become altogether incapacitated.

In *Eyre* v. *Houghton Main Colliery Co.* (1) the Master of the Rolls left the question open. Fletcher Moulton L.J. said that the factor was relevant, but Buckley L.J. was of the contrary opinion. What was said in *Law* v. *William Baird & Co.* (2) was only dictum. *Jones* v. *Anderson* (3) and *Gray* v. *Shotts Iron Co.* (4) do not carry the matter any further.

[LORD COZENS-HARDY M.R. referred to *Elliott* v. *Curry & Dodd.* (5)]

In *Hart* v. *Cory Brothers* (6) *Hargreave* v. *Haughhead Coal Co.* (7) was applied. It cannot be said that there was no evidence upon which the county court judge could find that there was partial incapacity. The question now under review was also considered in *Burt* v. *Fife Coal Co.* (8) In *Housley* v. *Hadfields, Ld.* (9) the contrary of the proposition now submitted was assumed.

The liabilities of the employer are not to be increased by the consequences of a new cause. The only question is whether the work offered to the man is suitable for him, and whether the learned judge in deciding that has not taken into consideration irrelevant matters.

*Shakespeare*, for the applicant. This is purely a question of fact and the judgment of the learned county court judge is conclusive: per Lord Dunedin in *Jones* v. *Anderson* (10), referring to his own decision in *Gray* v. *Shotts Iron Co.* (4) The value of the man in the labour market must be taken into consideration: *Ball* v. *William Hunt & Sons.* (11) Although he is still able to work, his chances of getting work are diminished; so he is entitled to compensation: per Lord Macnaghten. (12) The question is whether this is suitable

(1) [1910] 1 K. B. 695.
(2) (1914) 7 B. W. C. C. 846; 51 Sc. L. R. 388.
(3) (1914) 8 B. W. C. C. 2.
(4) (1912) 6 B. W. C. C. 287.
(5) (1912) 5 B. W. C. C. 584.
(6) [1916] 1 K. B. 172.
(7) [1912] A. C. 319.
(8) (1914) 8 B. W. C. C. 350.
(9) (1915) 8 B. W. C. C. 497.
(10) 8 B. W. C. C. 2, 5.
(11) [1912] A. C. 496.
(12) [1912] A. C. 501.

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employment within Sched. I., par. 3, and the evidence shows that it is not. The same principles apply to suitable employment as to the difference between regular and casual labour: *Knight* v. *Bucknill* (1); *Smith* v. *Buxton* (2); *Eyre* v. *Houghton Main Colliery Co.* (3); *Housley* v. *Hadfields, Ld.* (4) The finding of the judge cannot be interfered with. Even if he ought not to have taken into consideration the danger to the applicant's remaining eye, his other reasons are good and sufficient to support his decision.

*A. Parsons, K.C.*, in reply.

LORD COZENS-HARDY M.R. This is an appeal from a decision of his Honour Judge Greenhow in a case that was before us once before and was sent down to him for decision. An extremely important and, I need not say, very difficult point has been strenuously and very ably argued before us. It is a point on which I think there has been, taking dicta, only an equal division of opinion between the judges who have discussed it. In the present case I believe we are all of opinion that the award must stand and that there is enough to justify it. I have had a little doubt under those circumstances whether it is or is not desirable for us to make remarks which may be deemed to be mere dicta as not being necessary for the decision of the case, but upon the whole, out of respect to the arguments which have been addressed to us, I propose not merely to say that I think that the decision of the learned county court judge was right and cannot be interfered with, but to express my own view upon this much debated and much discussed point.

The case came before us in June, 1915. The facts are quite adequately stated in the report (5), and I will shortly indicate them. The workman was engaged in operating a steam hammer. There was a team of, I think, four men who worked together. While he was engaged in that work some steel injured his eye, and he lost the eye by reason of an accident admittedly arising out of and in the course of his employment. He was paid compensation for nine months, and the employers then discontinued it on the ground that the man was able to go back to his original work, which they offered him at

(1) (1913) 6 B. W. C. C. 160.
(2) (1915) 8 B. W. C. C. 196.
(3) [1910] 1 K. B. 695.
(4) 8 B. W. C. C. 497.
(5) (1915) 8 B. W. C. C. 584.

his old wages. He claimed an award as being still incapacitated, but the learned county court judge, on the ground that he was physically able to do his old work, dismissed the application although the employers had submitted to a declaration of liability. This Court held that the county court judge, in basing his award merely on the fact that the man was physically able to do his old work, had misdirected himself. He should have considered whether the work was suitable and also whether the man's earning capacity in the open market had been diminished. The case was remitted for a new trial, the workman being entitled in any event to a declaration of liability, as the employers had submitted to it. All the members of the Court pointed out that in the face of that formal submission by the employers to a declaration of liability or to a penny a week it was quite clear that such a declaration might be made, and it went back to the learned county court judge in effect to consider, and to consider only, whether the work which was offered to him by his employers, that is to say his old work at his old wages, was or was not suitable work. I will not read my own judgment, which is I think reasonably clear upon that point, but Pickford L.J. said that he thought that the view which the learned judge had taken that the man was physically able to do his old work and therefore earn from those employers his old wages was not conclusive to show that there had been no loss of earning capacity: "If that be so I think it was a misdirection. It may very well be that a man, in the open market, may not be able to command the same wages as he did before in consequence of an injury, but, at the same time, he is not losing any wages, because his employer is providing him with the same work at the same wages, and he is physically able to do it. But in that case there would arise the question, no doubt, whether he was bound to do that work. If he accepted the work the question would not arise; if he did not accept it the question would arise whether it was suitable work, but it does not arise at all until it has been found that there is some loss of wage-earning capacity." (1) Warrington L.J. said exactly the same thing—that it would be necessary for the judge to direct his attention to the question whether the work so offered was suitable work The case went down pursuant to our direction for a new trial, and by some arrangement which was extremely proper and

(1) 8 B. W. C. C. 590.

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reasonable the old evidence which was called as to the nature of the work and its risks at the first trial was not repeated, but, I presume with the consent of the advisers on both sides, it was agreed that that which not long before had been brought before the same learned judge should be treated as in evidence in the second case. The evidence then given was this and this only: "I am not now able physically to do my old work. I have been working as a labourer since at 24*s.* when I could. The heat and flare prevent my doing my old work." In cross-examination he says: "My furnace is not a small one. I do not earn more than 24*s.* The real thing I am afraid of is injury to my other eye. I work with tongs six feet long and put the metal under the hammer." Then Major, one of the same gang of four, says: "We work four in a gang, and an understanding between the men is necessary. It is very dangerous work. One is liable to break his arm or wrist. It is not fit work for a man with one eye. I would not work with him. He is not so quick. We get piece money. Glare affects the eye. Nothing to rest the eyes on. He is not able to do his old work. I am here on subpœna." Cross-examined: "I have never seen a one-eyed man on this work." That is all the evidence that was given, and I see no possible reason to doubt that on that evidence, particularly the evidence of the man in the gang with him who stated that the gang would not be willing to work with a one-eyed man like this, it was reasonably clear that the man's position in the labour market must have been affected by the circumstance of the loss of one eye and that this was not suitable employment.

I think that I ought to read practically the whole of the judgment of the learned county court judge: "At the original hearing of this case I was of opinion that Jackson was completely cured of his physical disability to do his original work of hammerman and made a clean award for his employers, the respondents. I did not consider the question of whether, although physically competent in every way for his former work, he was not injured in his prospects in the labour market, because the question was never raised or mentioned, nor was any evidence proffered with regard to it. I find, however, I ought to have considered that question, and so I do so now." That of course is in obedience to our direction. "I can hardly doubt that with so visible a defect as the loss of one eye

Jackson's position in the labour market will be detrimentally affected, and although still of opinion that he is physically and permanently able to do the work. I therefore now make a 'suspensory award' in accordance with the directions of the Court of Appeal and the voluntary offer of the respondents." I do not see how the learned county court judge could possibly have come to any other view than that which he did come to, having regard to the case of *Ball* v. *William Hunt & Sons* (1) in the House of Lords, where the House of Lords reversed the decision of this Court. That was a case where a man had one eye completely destroyed, although the fact that it was not available for sight was not manifest to any onlooker. By the accident which happened, arising out of and in the course of the man's employment, he lost the eye. It was really of no use for seeing with. He was physically just as able to do his work without that eye, because that had not assisted him in any way in doing his work. In this Court we took the view that under those circumstances it was not a case in which compensation could be claimed, but the House of Lords, if I may say so respectfully, I think with great good sense took a different view and said that although the man before had really only one eye, that fact was not visible to all the world, and that the circumstance which was visible to every one now that he had only one eye was a circumstance which must prejudice and affect his position in the labour market, and therefore he was entitled to compensation. Then the learned county court judge goes on to say: "A suspensory award, whether in the form of one penny per week or of a 'declaration of liability,' is founded on the hypothesis that the disablement continues although it may be dormant at the time (that it is 'partial'), and the question often arises in this Court at all events as to the kind of employment at which the workman can be required to work—whether it comprises any kind of work which he is able physically to do (including his old work) or only such as is 'suitable.' It seems to me that it is provided that it shall be 'suitable' work only by the words of par. 3 of the First Schedule," which he reads. 'The further question then arises what is suitable work, and in this case was the old work, which was and still is offered to him by the respondents, work which he was bound to accept under the penalty of forfeiting his compensation? I think he can do the work to the

(1) [1912] A. C. 496.

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sufficient satisfaction, at all events, of the respondents who offer it, but I also think he will do it at the very imminent risk of the great calamity of losing his remaining eye by a second accident and being rendered totally blind. It would be done under surroundings of flying splinters of metal, which obviously renders it highly dangerous to the eyes. Many grave reasons present themselves for thinking that a highly dangerous employment cannot be deemed a 'suitable' one, even though the danger lies rather in the exceptional seriousness of the consequences of a further accident to the particular individual (as in the case of a man with only one eye to serve him) than in the likelihood and seriousness of a second accident if it stood by itself. After considering the cases on this subject (some of which seem to deal with it under the aspect that the physical disability has ceased, and a suspensory award recognizing that partial disability continues has not been given), I think I am at liberty to deal with the matter of 'suitability' as a question of fact, and to keep in view all the circumstances and dangers of every kind which attend it, and I have no difficulty in coming to the conclusion that his old work still offered to Jackson by the respondents is not suitable and that he is not bound to accept it." And he makes an award accordingly.

Now in my opinion there was ample, and I think I may go so far as to say overwhelming, evidence before him to justify that finding. The men would not work with him. It is quite obvious that on the uncontradicted evidence, if the learned judge in the county court had not said anything about the calamity of losing his remaining eye, the case would not have been appealable at all; there would have been nothing more to be said about it. But is the fact that upon one of the reasons which he assigns there may be and there has been a difference of judicial opinion in itself enough to upset the award? In my opinion it is not. When several reasons are given for deciding in reference to a question of fact and some of those reasons are really indisputable, I do not think we ought to be astute in upsetting the award even if we think that one of the reasons which the judge assigned may be open to question. On that ground, therefore, in my opinion this award ought to stand. It is a question of fact which has been found by the learned county court judge. It was for him to find it, and we cannot inter-

fere unless there has been plain misdirection on a point which we think wrong and which, if decided the other way, must have involved a different decision upon the question of fact.

But, having said so much, I am not sure that it is right for me to embark upon the much disputed question as to how far it is reasonable or proper for the Court to have regard to what I will call the specially serious consequences to a one-eyed man of danger of an accident which will result in his, or may result in his, becoming completely a blind man. The matter first came, as far as I am aware, before this Court in *Eyre* v. *Houghton Main Colliery Co.* (1) A one-eyed man, a collier, was injured, and the learned county court judge was satisfied on the medical evidence that there was some appreciable risk "of injury to the remaining eye, and of injury generally in working at the face with only one available eye instead of two; and that Eyre would also, in consequence of the accident, for a considerable time, though possibly not always, either earn slightly less money than in his uninjured state, or have to work slightly harder to make the same money." In so far as it is merely a matter of getting less money, that is a matter which would only involve some extra payment under the Workmen's Compensation Act. Then he goes on to say this: "I am of opinion, as I have already said, that it is not quite suitable employment for him." This Court upheld the award, and in my judgment I did not embark on this disputed point. I said that it was a question of fact, that there was ample evidence to justify the finding of the learned judge, and that therefore the award would stand. Fletcher Moulton L.J., after saying that he quite agreed with my view that whether it was suitable occupation was a question of fact, then goes on to consider whether it is not suitable. I must read one passage from his judgment. Referring to what the county court judge said, he says (2): "In considering the circumstances of the man and of the case he says that his reasons for thinking it not suitable do not relate to the physical power of the man to do the work, but to the fact that the risk to the remaining eye is greater than before the accident and the consequences are more serious. In my opinion both those are circumstances which may rightly influence him. The mere fact

(1) [1910] 1 K. B. 695. (2) [1910] 1 K. B. 700

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that the risk would be greater does not necessarily carry with it that the employment is unsuitable, because the risk might be small, or it might be so very slightly increased that it would still be such an ordinary risk as persons who are earning their living in such an employment as this ought to be ready to run. But it is most certainly an element that has to be considered. Similarly the fact that the consequences of the risk, which is a special one in the case of mining, that is to say, injury to the other eye, would be so much more serious after this past accident is also a consideration which the county court judge is justified in having regard to." Then he gives an illustration of a man with delicate lungs who can reasonably object to any particular employment which exposes him to risk of colds which to other persons might not be so serious. But Buckley L.J., on the other hand, expresses a view diametrically opposite to that of Fletcher Moulton L.J. He says this (1): "He has expressed the opinion that this employment is not quite suitable. It is not a courageous conclusion, but it must, I think, mean that this employment although it approaches near to yet does not reach suitability. That is negativing suitability. Well, then, has he assigned grounds as matter of fact which he is entitled on the evidence to assign for coming to that conclusion? I do not myself accept that it would be a good reason to assign that having lost one eye the loss of the second would be of greater import to the man in question than to any other man. Of course it would be, but I do not think that that is relevant upon the question of suitability. What he found and what I think binds me is this: he finds that the man 'runs an increased appreciable risk,' as he says, 'to his remaining eye.' If you substitute 'to his eyesight' I agree with the learned judge. 'He runs an increased appreciable risk to his eyesight from being now rendered by the accident less quick to see and avoid coal flying from the face and the other risks incident to coal mining and machinery.' He seems to have found that this is a man who in this occupation suffers from a particular disability liable to lead him into danger, and that he ought not to be exposed to that danger. I do not think I can review that finding. That is a question of fact, and on that question of fact, although I myself should have arrived at another conclusion, I think that it

(1) [1910] 1 K. B. 701.

is the county court judge and not I who is the judge to decide." So that you have diametrically opposite views expressed by Fletcher Moulton L.J. and Buckley L.J.

Then it came on in the Scotch Courts, and in the Scotch Courts there was a most remarkable division of opinion. In the case of *Law* v. *William Baird & Co.* (1), which I think was the first one, there were three judges—the Lord President, Lord Johnston, and Lord Guthrie. The Lord President agreed with Buckley L.J.'s view, Lord Johnston agreed with Fletcher Moulton L.J.'s view, and Lord Guthrie agreed with the Lord President and with Buckley L.J. Then it came on again before the Scotch Courts in *Burt* v. *Fife Coal Co.* (2), where I think Lord Guthrie was present. Lord Skerrington, a new judge, was called in, and he agreed with Fletcher Moulton L.J. Then when we come to the Irish Courts, in *Elliott* v. *Curry & Dodd* (3) Barry L.C. very emphatically, both at the beginning and end of his judgment, expressed his concurrence with Fletcher Moulton L.J.'s view, and seemed to think that considerations of humanity almost prevented any one from saying that this was a suitable employment; but that was again a pure dictum. On the finding of the learned county court judge, or rather the recorder, the question did not really arise.

In those circumstances it is plainly open to this Court, when the question does arise, to consider it and decide it without being prejudiced by authority. I am bound to say that in my view what Fletcher Moulton L.J. said, rather than what Buckley L.J. said, ought to be followed in a case which arises directly for my decision. At least, subject to further argument, that is the view I should take.

I do not follow Mr. Parsons' very able argument that the decision of the House of Lords in *Hargreave* v. *Haughhead Coal Co.* (4) precludes us from considering it. I do not really see how that arises. This case went back to the county court judge really solely to consider, Aye or No, is this a suitable employment? We cannot go back on that; we are bound by our own decision, and the learned county court judge is equally bound, and nothing that was said by the

(1) 51 Sc. L. R. 388; 7 B. W. C. C. 846.

(2) 8 B. W. C. C. 350.

(3) 46 I. L. T. 72; 5 B. W. C. C. 584.

(4) [1912] A. C. 319.

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House of Lords in *Hargreave* v. *Haughhead Coal Co.* (1) throws any light whatsoever on the question of whether the employment is suitable or not. It might or might not be relevant to the question of whether there ought to have been a suspensory award in this case, but *Hargreave* v. *Haughhead Coal Co.* (1) seems to me to throw no light upon it.

With great respect to the very able and interesting arguments which we have heard on both sides, I think that on the facts this award cannot be upset, and so far as it is necessary to indulge in dicta I think that all the reasons given by the learned county court judge are reasons which it was proper for him to consider.

PHILLIMORE L.J. I agree that upon certain comparatively narrow grounds this award cannot be upset, and, speaking for myself, I regret that this judgment should be also the vehicle for certain dicta on an extremely difficult point which I do not think has been by any means yet thrashed out. However, I will express what I think about the case. The appellants have been embarrassed here by the course the proceedings have taken. They started by, perhaps unnecessarily, admitting liability for a suspensory award, and then they were handicapped by the unfortunate fact that the county court judge did not make that award to which they had submitted and to which at least the man was entitled, so that he went to the Court of Appeal with almost the certainty of success to some extent. However that may be, all that is past praying for. On the matter being remitted to the county court judge he has in my opinion found ample facts to justify his award. Speaking with respect to him, I still think that his judgment does not show that he thoroughly appreciates what the effect of a suspensory award may be. There are, as I ventured to put to Mr. Shakespeare in the course of the argument, two quite distinct grounds for a suspensory award. You may have an obvious continuous injury which nevertheless does the man no harm for the time in pounds, shillings, and pence, because if it is an injury which really makes him not quite so fit as a workman his old employers for many other reasons may be quite willing to give him his full wages. He may, indeed, have been in other respects rather above his class, and this injury

(1) [1912] A. C. 319.

may only bring him to the level of his class, or they may do it out of generosity or for other motives. Nevertheless they are not bound for all time, and they may quarrel with him or they may give up business or they may die, and then the man goes into the labour market to a certain extent handicapped. His old employers would give him his full wages, but he is not so good a man as he was and new employers may give him less. Or this curious and very subtle point may arise which arose in *Ball* v. *William Hunt & Sons* (1)—he may be actually as good a man, but he has a physical defect which makes him not look so good a man; in that case obviously his old employers know that there has been no real discovery of the defect which the man had all along, but only a revelation to the outside world, and to them he is as good as ever, as indeed he is; but when he goes into the open market he is observed to have obviously only one eye instead of apparently two, and in that respect his chances of getting as good wages as other people are diminished. That is one ground for a suspensory award. But another quite different ground is this: a man may be restored and able to do his work for that employer or any other employer equally well and at the same rate of wages, but he may have contracted from the trauma some latent injury or some sequelae which may burst forth at some later time, and that may especially happen with regard to the case of the eyes; and it is very necessary to dwell on the fact, because one must not confuse that danger of sympathetic mischief arising to the second eye with the danger of the loss of eyesight by the second eye being gone, and one has to bear that in mind when considering the authorities. He may have, therefore, as I say, some latent disease. It may be latent in the sense that it does not show, it may be latent in the sense that according to medical art and skill it will probably never arise, or it may be latent in both respects. If there is a chance of a recurrence or of damage to some other organ from the loss of the one, or of the reopening of a wound or anything of that kind, then it is right to make a suspensory award, not because the man's capacity, being what it physically is, is at all diminished in the open market, but because his physical incapacity may return at some time. These are two quite different causes for suspensory

(1) [1912] A. C. 496.

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awards, and I do not think the learned county court judge has thought that out in the course of his judgment. But, putting aside some of the phrases, and some of them not altogether to my mind, speaking with respect, satisfactory, I find that he has come to this conclusion: "The visible fact of the loss of one eye will detrimentally affect his position in the labour market." Whether that means because an employer will not take him so easily, or whether it means because gangsmen will not work with him so easily, or whether it means that an employer will not take him so easily because gangsmen will not work with him so easily, does not matter; he will be detrimentally affected in the labour market. That is quite possible. It is quite possible that, though the second eye may make no difference, the employers might think so or fellow workmen might think so, and that is quite enough to support the judgment that there is continuous partial incapacity. Now there is no continuous partial incapacity in the second class of suspensory awards where the man is as good as ever but there is a latent chance of the mischief recurring. But there is the first class where the man may get as much wages from his old employers but is not as good in the general market. Here the learned judge has found physical incapacity on that ground, and he has further found later on that the man is subjected to greater risks of further injury than he was before. That is a perfectly legitimate ground for treating him as to that extent physically incapable. He is physically incapable of doing his old work because his old work is not suitable. Really you ought to begin at that end. It is not that being physically incapable you then inquire whether his old work is suitable, but it is because his old work is not so suitable as it was that he is to that extent partially incapacitated, he having a work of danger in which quickness of eyesight is required. So the county court judge has found that he has not the same vision as he had before, and those are perfectly good grounds for deciding this case. If the work is not suitable, the fact that any judge thinks it is not suitable for one, two, three, or more reasons, of which all but one are bad reasons, makes no difference. It is not suitable if there is one good reason for saying that it is not. If those other reasons eliminate classes of work which the first objection would not eliminate, one might have to consider them; but if the question

is merely between one piece of work and another and there is one good reason why that work is not suitable, that is enough, and that is the view which this Court took, as it seems to me, in the case which has been so much referred to of *Eyre* v. *Houghton Main Colliery Co.* (1) Fletcher Moulton L.J. and Buckley L.J. differ toto caelo on the point which has been attempted to be argued before us, but they agree with the Master of the Rolls, who expressed no opinion on it in dismissing the appeal. They all agreed in doing that because the learned county court judge had given a perfectly good reason.

Now, without giving any final opinion, I must say that no argument yet put before us has fought the matter out to its conclusion. For instance, the reason given by Fletcher Moulton L.J. with regard to pneumonia of the lungs and so on, speaking with all respect, has nothing to do with the case. There a man is rendered more liable to contract disease by having had it. It is a risk, of course, but does not bear on the point whether the injury which he will receive will have more serious consequences. He receives the serious injury by virtue of a weak lung being attacked.

In some of the Scottish judgments the expression "insurance" has been used, and that expression was rather scouted in the course of the argument here, but I think it a very proper expression. You can say to an employer, "In your employment this man has lost an eye. Compensate him for it by all means, but, having lost one eye, if he loses the other there will be a total loss of eyesight. You are, therefore, not to expect him to go into such dangerous work as he went into before, and you are to pay him, as the less dangerous work will be less well paid, the difference." What is that but insuring him pro tanto against the loss of the second eye at the expense of the employer under whom he lost his first eye? These are matters which I think, amongst other things, must be considered. I quite see that in all these cases where there is a duplication of organs a man may be able to grasp with two fingers as opposed to his thumb, and therefore if he has two left the only danger may be that he may lose those two. The same thing with two eyes, which of course is the strongest case possible, and

(1) [1910] 1 K. B. 695.

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for all I know two ears. In all these cases where there is duplication of organs the loss of the second is much more serious than the loss of the first, and that has to be borne in mind. Those seem to be considerations which we shall have to discuss some day.

Now on the authorities it seems to me that the mass of them is against the contention of the respondents. I cannot reconcile the decision of the House of Lords in *Hargreave* v. *Haughhead Coal Co.* (1) with the possibility of the view which Mr. Shakespeare has been contending for. What happened there was that the man lost an eye. The arbitrator terminated the award, but according to Mr. Shakespeare he never should have terminated it, because there was always the liability to the loss of the second eye. The complication was that cataract broke out in the other eye, which led to a kind of suggestion that that might have something to do with the first eye. The House of Lords said "No. The cataract in the second eye is one thing and has broken out quite independently from the loss of the first eye. That being so, there is to be no suspensory award." Why? If the danger of total loss of eyesight exists from the moment that one eye has gone, there is always a risk. As Fletcher Moulton L.J. said, in some cases the risk would be very small, but there is always a risk. *Hart* v. *Cory Brothers* (2) is not a decision on this point, but there again the Master of the Rolls states what matters had been considered, and he says that these contingencies and liabilities were left open, but nothing else. One that was not left open was the danger of the loss of eyesight, but the Master of the Rolls apparently did not think that there was anything wrong in not having left that consideration open.

Then, lastly, Mr. Shakespeare has relied on *Housley* v. *Hadfields, Ld.* (3) It is quite true that there is an expression in that case in his favour, but, as I pointed out, it was only argued on one side. I cannot conceive the county court judge being a person who is sovereign in a matter of this kind; if the danger of the loss of eyesight is a matter to be taken into consideration, it must be taken into consideration in every case. It is not for the county court judge to find as a fact that in one case it exists and in another case it does not

(1) [1912] A. C. 319. (2) [1916] 1 K. B. 172.
(3) 8 B. W. C. C. 497.

exist. It always exists. It is the acceleration of the chance of the loss of eyesight because one of the two organs has gone. Therefore, without, as I say, wishing to be understood as expressing any definite opinion, but merely as stating, as the matter has arisen, what seems to me to be some of the considerations and only some, I content myself with saying that on the facts of this case I quite agree that this appeal should be dismissed.

SARGANT J. I am of the same opinion. As regards the question of partial incapacity, when regard is had to all that has taken place in this Court before and before the learned county court judge and the findings of fact of the learned county court judge on the point, and to the decision in *Ball* v. *William Hunt & Sons* (1), it seems to me clear that there is here a partial incapacity on the part of the workman, and, that being so, the provisions of par. 3 of the First Schedule of the Act come into play; that is to say, for the purpose of fixing the quantum of compensation you have to consider whether the employment that was offered to the workman was a suitable employment. Now here the employer offered to the workman his old work, but the workman was disinclined to accept that work, mainly on the ground that there was risk of an accident to the remaining eye, and that in that case, instead of being partially incapacitated, he would become totally blind. There were as a matter of fact before the county court judge several facts on which he might have found that the employment was unsuitable other than that apprehension on the part of the workman; but he has in fact, though not neglecting the other reasons, treated that as the principal reason for the finding to which he has come, and therefore it seems to me that we have now to inquire whether he has or has not misdirected himself in adopting that consideration as the principal reason for his judgment.

We are thus brought face to face with the two conflicting views that have been so clearly expressed by Fletcher Moulton L.J. and Buckley L.J. in the case of *Eyre* v. *Houghton Main Colliery Co.* (2) and have to choose one or other of them. Now it seems to me that risk is necessarily compounded of two elements—the probability of occurrence and the result of the occurrence if it occurs, or what may be called the seriousness of the consequences. If the

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seriousness of the consequences is greater though the probability of occurrence remains the same, I think that in ordinary parlance and in good sense the risk is greater. And indeed if you look, not at the probability of the injury to the mere physical organ, the eye, but at what is much more important, the probability of the loss of the faculty or sense of eyesight, the risk, even from the point of view of probability of occurrence, is obviously greater where the man has one eye only. It seems to me, therefore, that the view of Fletcher Moulton L.J. is to be preferred to that of Buckley L.J., and I must say that so far as it goes the case of *Housley* v. *Hadfields, Ld.* (1) appears to be rather in favour of the former view. As regards *Hargreave* v. *Haughhead Coal Co.* (2) in the House of Lords, I agree with the Master of the Rolls in thinking that that does not really assist in this case. This case is merely a question of determining whether certain employment is suitable and of arriving for the purposes of that determination at a solution of this question, namely, whether the added consequences of the danger which the workman suffers through his now having only one eye form a proper reason for considering that the employment is no longer suitable for him.

*Appeal dismissed.*

Solicitors : *Vincent & Vincent, for Day & Yewdall, Leeds ; Collyer-Bristow & Co., for Alfred Masser, Leeds.*

(1) 8 B. W. C. C. 497. (2) [1912] A. C. 319.

H. C. R.

GORDON HOTELS, LIMITED, Appellants *v.* LONDON COUNTY COUNCIL, Respondents. 1916 *April* 4

LONDON COUNTY COUNCIL, Appellants *v.* GORDON HOTELS, LIMITED, Respondents.

*Shop—Hotel—Restaurant—Shop Assistant—Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *s.* 19.

By s. 19 of the Shops Act, 1912, "the expression 'shop' includes any premises where any retail trade or business is carried on; the expression 'retail trade or business' includes . . . . the sale of refreshments or intoxicating liquors . . . . the expression 'shop assistant' means any person wholly or mainly employed in a shop in connexion with the serving of customers or the receipt of orders or the despatch of goods."

The premises of a licensed hotel consisted, inter alia, of a dining-room and smoking-room, which were mainly, but not exclusively, used by residents in the hotel, and of a grill-room, which was used as a restaurant both by residents and non-residents. In the kitchen food was prepared for consumption in both the residential and non-residential parts of the hotel without reference to the particular portion of the premises in which the food was to be consumed :—

*Held*, that the grill-room was a shop within the Shops Act, 1912, and that the kitchen formed part of the shop, and that servants of the hotel who were employed entirely in the kitchen, either in the preparation of food or in the cleaning of the kitchen or the utensils, were shop assistants within the Act, but that a kitchen clerk whose duty it was to order and check the supplies of provisions was not a shop assistant.

*Melluish* v. *London County Council* [1914] 3 K. B. 325 and *Prance* v. *London County Council* [1915] 1 K. B. 688 followed.

*Held*, also, that, whether the residential part of the hotel was a shop or not, the waiters in that part of the hotel were not employed wholly or mainly in the serving of customers and were, therefore, not shop assistants.

*Per* Ridley and Bray JJ. : The residential portion of an hotel is not a shop within the Shops Act, 1912.

*Savoy Hotel Co.* v. *London County Council* [1900] 1 Q. B. 665 distinguished.

Cases stated by a metropolitan magistrate.

In the first case five informations had been preferred by the respondents, the London County Council, against the appellants, the Gordon Hotels, Limited, for having failed to comply with the

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provisions of s. 1, sub-s. 1, of the Shops Act, 1912 (1), in respect of five persons named Groves, Chippett, Kendall, Gedge, and Perham, in that each of these persons did not during the week ending April 24, 1915, on one weekday in such week cease to be employed about the business of a shop after 1.30 P.M.

The magistrate convicted the appellants in respect of each of the five informations.

The following facts were proved or admitted:—The appellants were the proprietors of the First Avenue Hotel, High Holborn, which hotel was fully licensed. The business of the hotel consisted practically of two parts—i.e., that of receiving resident guests for longer or shorter periods, for whose accommodation the usual public rooms found in a first-class hotel were provided, including a large dining-room. This dining-room was used almost entirely by visitors resident in the hotel, but was open to non-resident visitors as well. There was also attached to the hotel, and carried on under the same licence so far as intoxicating liquors were concerned, a grill-room, which was open to and used by visitors, both resident and non-resident, as a dining-room, luncheon-room, and grill-room, together with luncheon buffets.

Part of the premises was used as a kitchen and was situated in the basement. This kitchen was used for the purposes of the hotel as a whole, and in it was prepared and cooked food for all parts of the licensed premises in bulk and without reference to the particular portion of the premises in which the viands were to be consumed by visitors to the premises. A plan, produced at the hearing, showed the relative situation of the kitchen and departments immediately connected with it, and the hotel dining-room, and the grill-room,

(1) Shops Act, 1912 (2 Geo. 5, c. 3), s. 1: "(1.) On at least one weekday in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon . . . ."

Sect. 19: "(1.) In this Act—

"The expression 'shop' includes any premises where any retail trade or business is carried on;

"The expression 'retail trade or business' includes . . . . the sale of refreshments or intoxicating liquors . . . . ;

"The expression 'shop assistant' means any person wholly or mainly employed in a shop in connexion with the serving of customers or the receipt of orders or the despatch of goods."

luncheon-room and buffets, these latter being situated on the ground floor and entirely unconnected with the kitchen except by ways to which the visitors had no access or by food-lifts.

Groves was a clerk in the kitchen acting under the instructions of the chef, who had the general control of obtaining and preparing provisions for the hotel at large; it was the duty of Groves to order supplies required, and to check them on delivery at the premises, and occasionally to leave the premises to procure any particular article. None of his duties required him to be in any of the rooms used by the visitors. Chippett was what was known as larder cook; he chopped up meat of various kinds for use in the hotel generally. Kendall was a working cook, cooking for all departments of the hotel. Gedge was a kitchen porter; he swept up the kitchen, looked after some fires, obtained provisions from the larder, cleaned fish, and occasionally took cooked food to the food-lifts connected with either the hotel dining-rooms or the other dining-room, luncheon-room, or buffets. Perham was a knifeman; he cleaned knives for use in any portion of the premises. None of these last four men had any duties in, or attended in, any of the public rooms of the hotel. During the week ending April 24, 1915, these five men were emp'oyed in their ordinary duties each weekday after 1.30 P.M.; but they, in common with all other servants of the hotel, were given hours off duty suitable to the necessities of carrying on the hotel, and whole holidays from time to time. They were all adults, and were entirely satisfied with the conditions of their employment.

It was contended on behalf of the respondents that these five persons were "shop assistants employed about the business of a shop" within the meaning of the Shops Act, 1912, and, therefore, there had been a breach of the statute in respect of each of them in that they were so employed throughout the week ending April 24 after 1.30 P.M.

On behalf of the appellants it was contended that the duties of each of the five persons did not bring them into contact with, and were not even directly connected with, the visitors to the hotel; that their duties were in relation to the whole business of the hotel; that persons resident in the hotel, in connection with whose requirements part of the duties of the five persons was performed, were not customers in a shop; that the hotel portion of the premises in which persons

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resided was not a " shop " within the meaning of the Act ; that in so far as the duties of the five persons were performed in relation to persons not resident in the hotel they were engaged in those duties in the portion of the hotel which was not part of a " shop " ; and that there was no evidence upon which the magistrate could in law hold that the five persons were " shop assistants " within the meaning of the Act.

The magistrate delivered a written judgment in which he said that it was admitted that the restaurant portion of the hotel premises was a shop, and the question was whether the kitchen was part of the premises on which the business of the shop was carried on. After referring to *Melluish* v. *London County Council* (1) and *Prance* v. *London County Council* (2) and stating that the question was one of degree, he said that he was satisfied that the kitchen, without which the business of the restaurant could not be carried on, was so immediately and physically connected with the customers' part as to be part of the shop, and he found as a fact that it was part of the premises in which the business of the grill-room was carried on, and therefore was a shop within the meaning of the Act. He further found as a fact that the five men in question were wholly or mainly employed in a shop in connection with the serving of customers, because their work not only facilitated the serving of customers but was an essential part of the operation of serving, without which it would be impossible to carry on the retail business in the grill-room. He did not think that the fact that part of the food which they cooked in bulk went to the hotel proper and part to the grill-room justified him in saying that they were not wholly or mainly employed in connection with the serving of the customers who were catered for in the grill-room. He therefore held that the five persons were shop assistants within the meaning of the Act, and he convicted the appellants as above stated, subject to this case.

In the second case, which related to the same hotel, a similar question arose with regard to four waiters, one of whom was employed in the smoking-room lounge and the other three in the dining-room. This dining-room and the smoking-room lounge were used almost entirely by visitors resident in the hotel, though they were open to non-resident visitors as well.

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The magistrate dismissed the informations. In delivering judgment he said it had been contended that all inns or hotels were, by reason of s. 19, shops within the Act, but he was not prepared to hold that that was so in respect of the board and lodging provided for those guests who were resident in the hotel. It might be that, where refreshments were served to any one who chose to come into the dining-room or smoking-room of an hotel, those rooms might properly be described as a shop within the meaning of the Act, but it was not necessary to decide that point in this case, because, even assuming that the dining-room and smoking-room of this hotel could in respect of the sale therein of refreshments to non-residents be properly described as a shop, there was no evidence which satisfied him that the waiters were wholly or mainly employed in serving non-residents, and therefore they were not shop assistants within the meaning of the Act.

The question for the opinion of the Court in each case was whether upon the above facts the magistrate came to a correct determination and decision in point of law.

*Macmorran, K.C.*, and *Bodkin*, for the Gordon Hotels, Limited. Although a place used for the sale of refreshments or intoxicating liquors, such as a restaurant or public-house, is a shop within the definition in s. 19 of the Shops Act, 1912, a large residential hotel is not a shop. The Act is dealing with premises where a retail business, which means the business of selling goods, is carried on. The business of an hotel is not a retail business. If the hotel regarded as a whole is not a shop, the fact that refreshments are supplied to non-residents in that part of the hotel which is used as a grill-room does not cause the grill-room to be a shop within the Act. The grill-room is only one of the incidents of the hotel business. Assuming the grill-room is a shop, there is no finding of fact, as there was in *Melluish* v. *London County Council* (1), that the kitchen, which is used for the purposes of the whole hotel, is a part of that shop. There was no evidence on which the magistrate could find that any of the persons mentioned in the first case were wholly or mainly employed in connection with the serving of the customers in the grill-room, and therefore they are not shop assistants within the meaning of the

(1) [1914] 3 K. B. 325.

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Act. The connection with the serving of customers must be direct, not indirect or remote: *Melluish* v. *London County Council* (1); *Prance* v. *London County Council*. (2)

With regard to the second case, whether the hotel is a shop or not, the magistrate rightly held that the waiters in the dining-room and smoking-room were not wholly or mainly employed in connection with the serving of customers.

*Travers Humphreys*, for the London County Council. The whole of this hotel is a shop within the definition in this Act, for by s. 19 the expression "retail trade or business" is defined to include the sale of intoxicating liquors, which is one branch of the business carried on in an hotel. In *Savoy Hotel Co.* v. *London County Council* (3) it was held that the Savoy Hotel was a shop within the Shop Hours Act, 1892. A restaurant, which per se is admittedly a shop, does not cease to be a shop because it forms part of the premises of an hotel. If this hotel is a shop the waiters in the second case were wholly or mainly employed in connection with the serving of customers. [He referred to the Shops Act, 1913 (2 & 3 Geo. 5, c. 24).]

*Macmorran, K.C.*, in reply. By the definition section in the Shop Hours Act, 1892, on which *Savoy Hotel Co.* v. *London County Council* (3) was decided, licensed public-houses were included in the term "shop," and as there is no distinction as regards the licence between an hotel and a fully-licensed public-house, the Court was obliged to hold that the Savoy Hotel was a shop within that Act; but effect can be given to the definition in the Act of 1912 without the absurdity of saying that a large residential hotel is a shop.

RIDLEY J. In these two cases informations were preferred against the Gordon Hotels, Limited, for having failed to comply with the provisions of the Shops Act, 1912, with regard to the weekly half-holiday, in the case of certain of their employees. The magistrate held that five of these employees were shop assistants within the meaning of the Act, and he therefore convicted the company; in the case of four of the employees he held that they were not shop assistants, and the informations in respect of them were dismissed. The

(1) [1914] 3 K. B. 325. (2) [1915] 1 K. B. 688.
(3) [1900] 1 Q. B. 665.

result is that two cases have been stated for the opinion of this Court, and the question in each case which we have to decide is whether these employees are shop assistants within the Act of 1912. They are all employed in various capacities in the hotel, and it appears that part of the premises consists of a grill-room in which persons who are not resident in the hotel can obtain lunch. This grill-room is distinct from the rest of the hotel, which is an hotel in the ordinary sense of the word. In that part of the hotel which may be called the hotel proper there are a dining-room and a smoking-room, and one of the questions raised in this case relates to the waiters who are employed in those two rooms. The magistrate did not decide whether the residential parts of an hotel could be properly described as a shop within the Act in respect of the sale therein of refreshments to non-residents; it was not necessary for him to decide that question, because there was no evidence that the waiters in the dining-room and smoking-room were "wholly or mainly employed in a shop in connection with the serving of customers," and, therefore, they were not "shop assistants" within the definition in s. 19 of the Act. It seems to me that in respect of the general classification of premises the magistrate has drawn the right distinction. I cannot think that an hotel, the primary business of which is to provide residence for visitors, is a shop within this Act. The Legislature was dealing in the Act with retail establishments, and an hotel cannot be regarded as a retail establishment; but it had to be made clear that the Act was intended to apply to premises on which the sale of refreshments, including intoxicating liquor, was carried on, and therefore the definition of "shop" in s. 19 is made to include any premises where the retail trade or business of the sale of refreshments or intoxicating liquors is carried on. I do not think that an hotel in the ordinary sense of the word was intended to be covered by the definition of a shop. In the case of *Savoy Hotel Co.* v. *London County Council* (1) it was held that the Savoy Hotel came within the definition of shop in the Shop Hours Act, 1892, but the language of the definition section in that Act was quite different from that of s. 19 in the Act of 1912, and there is nothing in the decision in the *Savoy Case* (1) to compel us to hold that merely because an hotel is a licensed house it is a shop within the Act of 1912.

(1) [1900] 1 Q. B. 665.

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In the cases in which the magistrate has convicted the facts show that the employees in question, with one exception, although they were not directly employed in serving customers, were mainly employed in connection with the serving of customers within the principle which has been laid down in the cases referred to, and the magistrate's decision with regard to them was therefore right. But I am unable to agree with the decision of the magistrate in the case of Groves, the kitchen clerk. In *Prance* v. *London County Council* (1) Rowlatt J., in considering the meaning of the words "in connection with the serving of customers," said: "I incline to the opinion that it is a matter of degree, in which one has to be guided by common sense, and not really a question of law. Some one has to decide the question of degree, and I think that the tribunal of fact really ought to decide that, provided it does not go hopelessly wrong in the sense of deciding without any evidence in support of the decision." Now the facts with regard to the work done by Groves are set out in the case. He was the person who had to obtain supplies, but he had nothing to do with the preparation of the actual food served to the customers, and I do not think there was any evidence on which the magistrate could hold that Groves was wholly or mainly employed in connection with the serving of customers. The decision of the magistrate with regard to Groves must therefore be reversed, but I entirely agree with the decision of the magistrate with regard to the other men.

I only wish to add that I am very sensible of the difficulty which confronts the Court which has to decide the question whether any particular person comes within the provisions of this Act.

BRAY J. I agree. The first appeal relates to five persons employed by the Gordon Hotels, Limited, at the First Avenue Hotel, and in my opinion, with the exception of the kitchen clerk Groves, the case is governed by *Melluish* v. *London County Council* (2) and *Prance* v. *London County Council*. (3) I am not prepared without further consideration to agree entirely with everything that was said in the judgments in those cases, but seeing that judgments were delivered by five judges, I consider that we ought to follow them.

(1) [1915] 1 K. B. 695. (2) [1914] 3 K. B. 325.
(3) [1915] 1 K. B. 688.

With regard to three of the five persons dealt with in the first appeal —namely, Chippett, Kendall, and Gedge—I think they are clearly covered by the decision in *Melluish's Case* (1), for it is impossible to draw any distinction between their work and the work done by the kitchenmaid in *Melluish's Case.* (1) They were all engaged in the preparation of food which was to be supplied to the customers in the grill-room. It is quite clear that the grill-room was a restaurant and that the kitchen formed part of the restaurant, and that according to that decision both the restaurant and the kitchen are shops within the meaning of this Act. With regard to Perham, the knifeman, I think we are equally bound by *Prance* v. *London County Council* (2) to hold that the decision of the magistrate was right. In *Prance's Case* (2) five operations were performed by a potman employed in a public-house. They were (1.) putting up tables for customers' dinners and taking them down again; (2.) cleaning knives in so far as they were for subsequent use at the customers' tables; (3.) polishing pewter and copper measures used thereafter for measuring or serving out drinks to customers; (4.) collecting glasses after they had been used by customers from various parts of the bars for cleaning by the barmen; (5.) cleaning and tidying the premises for use by customers at various times of the day. The question for the opinion of the Court was whether any one or more of these five employments were or were not sufficiently proximate to the serving of customers within the meaning of s. 19, sub-s. 1, of the Act to justify the magistrate in regarding it as an employment in connection with the serving of customers. The Court having held that all the operations were those of a shop assistant, I think we ought equally to hold that Perham is a shop assistant.

I think Groves's case stands on a different footing. In *Melluish* v. *London County Council* (3) Avory J. said: "I agree that it would not be possible to hold that every person employed in any capacity on premises where a retail business is carried on is employed in connection with the serving of customers. I think there must be a direct connection with the serving of customers and not a remote and indirect connection." In my opinion the employment of Groves

(1) [1914] 3 K. B. 325. (2) [1915] 1 K. B. 688.
(3) [1914] 3 K. B. 327.

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had no direct connection with the serving of the customers. He had nothing to do with the preparation of the food which the customers consumed, or of the room or the utensils. All that he did was to obtain the goods. The first appeal therefore succeeds as to Groves and fails as to the others.

In the second case, which is an appeal by the London County Council from the magistrate's refusal to convict, the employees in question were waiters in the dining-room and smoking-room in the hotel proper, that is to say, in that part of the hotel which was mainly used by the residents in the hotel, though these rooms were also open to non-residents. It has been contended that the hotel is a shop within the meaning of this Act. In my opinion it is not. The Act implies, and states, that it is dealing with shop assistants who are employed to serve customers; but people who are staying in hotels are never spoken of as customers, but as visitors or guests, and it seems to me, therefore, that for the purposes of this Act a shop must necessarily be a place where customers are served. An hotel is not a place of that sort. That is sufficient to dispose of the second appeal, for all the waiters were engaged in rooms in the hotel proper, and, although persons not staying in the hotel had access to those rooms, the magistrate has found that there was no evidence that the waiters were wholly or mainly employed in serving non-residents. They were, therefore, not shop assistants within the meaning of the Act, and the second appeal must be dismissed.

AVORY J. I agree, though with some doubt as to one point. Having regard to the decisions of this Court which have been referred to, I think that the first appeal fails except as to the case of Groves. But for the decision in *Prance* v. *London County Council* (1) I should have been prepared to hold that Perham was not a shop assistant within the Act. I do not myself feel the difficulty, which Lush J. spoke of in *Prance's Case* (1), in understanding the language which I used in giving judgment in *Melluish's Case* (2), and which Bray J. has quoted in this case. I thought, and I still think, that the expression "direct connection," as contrasted with a remote or indirect connection, with the serving of customers might afford some sort of guide to the magistrates who have to decide the difficult

(1) [1915] 1 K. B. 688. (2) [1914] 3 K. B. 325.

questions of fact which arise in cases under this Act. If I had been at liberty to do so, I should have said that Perham's employment was only remotely or indirectly connected with the serving of customers, but it is clear that he is just as much within the Act as the potman in *Prance's Case* (1) was.

With regard to Groves, I find nothing in the judgments in *Prance's Case* (1) to prevent this Court from holding that his employment was so indirectly connected with the serving of the customers that he was not a shop assistant within the definition in the Act. I cannot distinguish his case from that of the manager of a refreshment-house business whose duty it is to buy the food which is to be used in the business.

The other appeal raises the question whether the waiters employed in those parts of the premises which are mainly used by residents in the hotel are within the Act. I find great difficulty in agreeing with the opinions of Ridley and Bray JJ. on this point, and my difficulty arises from the decision in *Savoy Hotel Co.* v. *London County Council.* (2) That case was decided under the Shop Hours Act, 1892, by s. 9 of which "shop" was defined to include licensed public-houses, and it was held that the Savoy Hotel, which is certainly not a public-house in the popular sense of the word, was a shop within that Act. It seems to me that if we apply the reasoning of that decision to this case it is very difficult to hold that some parts of this hotel are not a shop within the Act of 1912, and I foresee that great difficulty may arise in the future in the administration of this Act if magistrates are required to decide which portions of hotel premises are a shop and which are not. But I am not disposed to differ from the result at which the rest of the Court has arrived, namely, that the appeal must be dismissed, because the magistrate, as my brother Bray J. has pointed out, in giving judgment stated that, although it might be that where refreshments were served to any one who chose to come into the dining-room or smoking-room of an hotel those rooms might be properly described as a shop within the meaning of the Act, it was not necessary in this case to decide whether all hotels were shops, there being no evidence in this case which satisfied the magistrate that the waiters were wholly or mainly employed in serving the non-residents. I am prepared to agree that residents in an

(1) [1915] 1 K. B. 688. (2) [1900] 1 Q. B. 665.

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hotel cannot properly be described as customers, and therefore the magistrate was right in holding that the waiters were not shop assistants within the meaning of s. 19, sub-s. 1, of the Act.

*First appeal allowed in part. Second appeal dismissed.*

Solicitors for Gordon Hotels, Limited: *Stanley, Woodhouse & Hedderwick.*

Solicitor for London County Council: *E. Tanner.*

F. O. R.

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1916
*April* 11.

## THE MAYOR, ALDERMEN, AND BURGESSES OF CHELMSFORD, APPELLANTS *v.* BRADRIDGE, RESPONDENT.

*Public Health—Drainage of House—Cesspool—Expense of providing—Power of Local Authority to recover—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 23.

By s. 23 of the Public Health Act, 1875, where any house within the district of a local authority is without a drain sufficient for effectual draining, the local authority shall by written notice require the owner or occupier of the house to make a covered drain emptying into any sewer which the local authority are entitled to use and not more than 100 feet from the house; but if no such means of drainage are within that distance, then emptying into such covered cesspool or other place as the local authority direct. If the notice is not complied with the local authority may do the work required and recover in a summary manner the expenses incurred by them from the owner.

A certain house was without a drain sufficient for effectual draining, and there was no sewer within 100 feet of the house which the local authority were entitled to use:—

*Held*, that the powers of the local authority under the above section are not confined to the case where there is an available covered cesspool in existence, but that they may give notice to the owner of the house requiring him to make a covered drain emptying into a covered cesspool to be constructed, and, upon his failure to comply with the notice, may construct a covered drain and covered cesspool and recover from him the cost of so doing.

CASE stated by justices for the county of Essex.

1. A complaint was preferred by George Melvin, town clerk of the borough of Chelmsford, for and on behalf of the mayor, aldermen, and burgesses of the borough, who, acting by the borough council, are the urban sanitary authority for the borough, and are

hereinafter called the appellants, against Alfred Bradridge, of Springfield Mill in the borough, hereinafter called the respondent.

2. The complaint was laid under ss. 23, 251, and 257 of the Public Health Act, 1875, and prayed that the respondent might be summoned to show cause why an order should not be made upon him for payment by him to the appellants of certain expenses incurred by the appellants in the execution of a covered drain emptying into a covered cesspool in respect of Springfield Mill.

3. The complaint was heard and dismissed by the justices.

4. The following facts were proved or admitted :—

(*a*) The respondent was the owner and occupier of Springfield Mill.

(*b*) The appellants gave notice to the respondent under s. 23 of the Public Health Act, 1875 (1), requiring him to make a covered drain emptying into a covered cesspool at Springfield Mill.

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23 : "Where any house within the district of a local authority is without a drain sufficient for effectual drainage, the local authority shall by written notice require the owner or occupier of such house, within a reasonable time therein specified, to make a covered drain or drains emptying into any sewer which the local authority are entitled to use, and which is not more than 100 feet from the site of such house ; but if no such means of drainage are within that distance, then emptying into such covered cesspool or other place not being under any house as the local authority direct ; and the local authority may require any such drain or drains to be of such materials and size, and to be laid at such level, and with such fall as on the report of their surveyor may appear to them to be necessary.

"If such notice is not complied with, the local authority may, after the expiration of the time specified in the notice, do the work required, and may recover in a summary manner the expenses incurred by them in so doing from the owner, or may by order declare the same to be private improvement expenses.

"Provided that where, in the opinion of the local authority, greater expense would be incurred in causing the drains of two or more houses to empty into an existing sewer pursuant to this section, than in constructing a new sewer and causing such drains to empty therein, the local authority may construct such new sewer, and require the owners or occupiers of such houses to cause their drains to empty therein, and may apportion as they deem just the expenses of the construction of such sewer among the owners of the several houses, and recover in a summary manner the sums apportioned from such owners, or may by order declare the same to be private improvement expenses."

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(*c*) The covered cesspool into which the covered drain was to empty was not in existence at the time when the notice was given.

(*d*) The nearest sewer which the appellants were entitled to use was more than 100 feet from the said premises.

(*e*) The respondent failed to carry out the requirements of the notice.

(*f*) The appellants entered on the premises and constructed thereon at a cost of 47*l.* 9*s.* 6*d.* a covered drain and a covered cesspool into which the covered drain emptied.

(*g*) The respondent had not paid that sum after service of a demand upon him so to do.

5. Counsel for the respondent contended that s. 23 of the Public Health Act, 1875, did not apply to this case, as no cesspool into which the covered drain could be made to empty existed at the time when the notice was served; that s. 23 did not empower the appellants to call upon the respondent to construct a cesspool, or to construct a cesspool themselves if the respondent failed to comply with the notice to that effect; that as no cesspool existed a covered drain could not be constructed to empty thereinto; and that therefore the appellants could not proceed under s. 23.

6. Further contentions were raised on behalf of the respondent, but, the justices having decided to dismiss the complaint on the ground set forth in paragraph 7 below, it was unnecessary to decide upon those contentions.

7. Being of opinion that s. 23 did not empower the appellants to require the construction of a cesspool qua cesspool and as distinguished from a drain, or in default themselves to construct such a cesspool, and further that, as no cesspool existed, the appellants could not compel the construction of a drain emptying thereinto, the justices dismissed the complaint.

8. The question of law was whether the justices correctly interpreted s. 23 of the Public Health Act, 1875, and rightly dismissed the complaint.

*Macmorran, K.C.*, and *E. H. Tindal Atkinson*, for the appellants.
*Clavell Salter, K.C.*, and *Naldrett*, for the respondent.

RIDLEY J. This case raises a question of some importance, upon which, however, there seems to have been no decision. Sect. 23

of the Public Health Act, 1875, deals with two cases, first, where there is a sewer within 100 feet from the particular house in question, and, secondly, where there is no sewer within that distance. In the second case the drains of the house are to enter into "such covered cesspool or other place not being under any house as the local authority direct." The argument turns upon those words. It is said that as there was no covered cesspool in existence the owner could not be required to make a drain emptying into it, and that the effect of the section is that the owner of a house without a drain sufficient for effectual drainage, in case there is no sewer within 100 feet from the site of the house and no covered cesspool, cannot be ordered to improve the drainage of his house. It is true that the enactment enabling the local authority to do the work required does not say in so many words that the work is to include the construction of a covered cesspool or other place; but to lay it down that where there is no existing covered cesspool the enactment is inoperative would be to limit its application in a serious degree. If on a reasonable construction the words "such covered cesspool . . . . as the local authority direct" can be made to include a cesspool not in existence, we ought to adopt that construction. Sect. 25 of the Act is in favour of such a construction. That section relates to new houses. It provides that it shall not be lawful in any urban district newly to erect any house unless and until a covered drain or drains be constructed, of such size and materials, and at such level and with such fall, as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of the house; and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use, and which is within 100 feet of some part of the site of the house; "but if no such means of drainage are within that distance, then" the drain or drains "shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct." In that section the words "such covered cesspool . . . . as the local authority direct" refer to a covered cesspool not yet existing and impose upon the person erecting a new house the burden of making a covered cesspool. The same form of words was used with reference to new houses in s. 49 of the Public Health Act, 1848. That is enough to guide us in this case. Where an

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old house is without a drain sufficient for effectual drainage we ought to give to words in s. 23 that meaning which the same words clearly have in s. 25 of the Act of 1875 and in s. 49 of the Act of 1848. As a result the owner of an old house may in a proper case be called upon to make a covered cesspool or other place as directed by the local authority, and in default of so doing may be ordered to pay the expenses of executing the work. The appeal must therefore be allowed.

BRAY J. I am of the same opinion. We have to consider how far s. 23 of the Public Health Act, 1875, applies to houses which are without a drain sufficient for effectual drainage, that is, to houses which require to be and are not effectually drained. With regard to such a house, if there is no sewer which the local authority are entitled to use within 100 feet from the site of the house, and no available cesspool, it is argued that the local authority has no powers under this section. To think that such a state of things has existed since 1875 is startling. On the other hand, if it has been generally taken for granted that the section applies to a house in these circumstances, that sufficiently explains why in all that time no case has appeared raising the question. The material words are "emptying into such covered cesspool or other place not being under any house as the local authority direct." Precisely the same words occur in s. 25 which include the case where there is no covered cesspool in existence. It is said that none the less we must construe those words differently in s. 23. Before accepting that view I should require strong reasons in favour of it. The reasons seem opposed to it. The same words happen to have been used in s. 49 of the Act of 1848, which applied to new houses. The words in that section are "such last mentioned drain or drains shall communicate with and be emptied into such covered cesspool or other place, not being under any house, and not being within such distance from any house, as the said local board shall direct." Those words clearly applied to a case where there was no existing cesspool. They have been imported into s. 23 of the Act of 1875. We must give them the same meaning. They apply to the case of a cesspool which has to be constructed.

AVORY J. I agree. There is no reason for construing the words "such covered cesspool . . . . as the local authority direct" in a different sense in s. 23 from that which they admittedly bear in s. 25. The justices dismissed the complaint for the reasons given in paragraph 7 of the special case. Their decision would reduce s. 23 to a nullity; it would confine its application to the case where there was an existing drain and an existing cesspool, and where the complaint was that the drain was not sufficiently large. In that case, it is said, the owner may be required to enlarge the drain emptying into the cesspool, but cannot be required to enlarge the cesspool. Some light is thrown upon this question by the provisions of the Act in case the owner does not comply with the notice of the local authority requiring him to make a covered drain emptying into a sewer or cesspool. The local authority may "do the work required," that is to say, where there is no sewer, the work including both the drain and the cesspool. For these reasons I think that prima facie the owner is liable for these expenses. There were, however, as stated in paragraph 6 of the case, other contentions raised which may have to be decided. The case must therefore be remitted to the justices to be further dealt with by them.

*Appeal allowed. Case remitted to justices.*

Solicitors for appellants: *Hargreaves & Crowthers, for G. Melvin, Chelmsford.*

Solicitors for respondents: *Hilliard & Ward, Chelmsford.*

W. H. G.

1916
*April* 3, 12, 13, 14.

## HORWOOD *v.* MILLAR'S TIMBER AND TRADING COMPANY, LIMITED.

*Contract—Illegality—Public Policy—Assignment of present and future Earnings—Covenant not to leave present Employment without Sanction of Assignee.*

By an indenture made between a person, therein called "the mortgagor," who was a clerk in the employment of the defendant company, and the plaintiff, therein called "the lender," the mortgagor, who was owing certain sums to various creditors which the lender agreed to pay on having the repayment secured to him in manner therein appearing, assigned to the lender, inter alia, all the salary, wages, or other moneys then or thereafter, during the continuance of the security, to become due to him under his employment with the defendants or with any other employers, to hold to the plaintiff absolutely but subject to a proviso for redemption. The mortgagor then covenanted that he would repay the lender by certain instalments; that during the continuance of the security he would not, without the express sanction in writing of the lender, determine his engagement with the defendants or other his employers for the time being; that he would not borrow or attempt to borrow any money or part with, sell, or pledge his furniture, chattels, or effects, or obtain or endeavour to obtain credit or permit any one to pledge his credit (save his wife in the case of ordinary tradesmen's books for weekly settlement), or make himself or his property answerable for any sum of money whether legally or morally; and that he would not, without the lender's consent in writing first had and obtained, remove from his then dwelling-house or take any other dwelling-house:—

*Held*, that the contract was entire and indivisible, and was bad as being contrary to public policy inasmuch as it unduly and improperly fettered the free disposal of the mortgagor's labour.

Appeal from the City of London Court.

The plaintiff Horwood claimed that an account be taken of all salary or wages and all overtime, extras, increments, remuneration, and bonuses due from the defendant company to one Bunyan (a clerk in the defendants' employment) on June 24, 1915, or which had accrued due from the defendants to Bunyan since that date, which salary, &c., had by an indenture dated July 1, 1913, been assigned by Bunyan to the plaintiff, and notice thereof been duly given by the plaintiff to the defendants. The plaintiff further claimed payment

by the defendants of the amount found due on the taking of the account.

The indenture above referred to was made "between George Frederick Victor Bunyan, of 44, Peak Hill, Sydenham, in the county of London, a clerk in the employ of Messrs. Millar's Timber and Trading Company, Limited (hereinafter called 'the mortgagor') of the one part, and Fred. Horwood, of 134, Burnt Ash Hill, Lee, in the county of Kent, builder (hereinafter called 'the lender'), of the other part," and it recited that "Whereas the mortgagor is indebted to the various persons set out in the first schedule hereto amounting to the sum of 42*l.* 8*s.* 3*d.* which the mortgagor hereby declares to be a complete statement of all his liabilities whatsoever (which declaration is and shall be considered to be the prime factor inducing the lender to enter into this arrangement) and has requested the lender to pay and discharge the same on his behalf which the lender has agreed to do on having the repayment of such sum of 42*l.* 8*s.* 3*d.* together with the sum of 31*l.* 16*s.* agreed interest thereon making a total of 74*l.* 4*s.* 3*d.* secured to him" in manner thereinafter appearing.

The following were the material clauses of the indenture:—

"1. In pursuance of the said agreement and in consideration of the premises the mortgagor as beneficial owner hereby assigns unto the lender first, all that policy of assurance particulars whereof are set forth in the second schedule hereto and all money assured by or to become payable under the said policy and the full benefit thereof; secondly all that the salary or wages now due or henceforth to become due to him the mortgagor in connection with his engagement or employment with Messrs. Millar's Timber and Trading Company Limited or any other situation post or office that he may during the continuance of these presents hold in the said company or with or in any other company office person or firm whatsoever Together with all overtime extras increments and remuneration in connection with any such employment receivable or to be received by him in respect thereof including any moneys that may or might be paid to him by way of bonus or otherwise should he be discharged from or leave his present employment or that he may or might be paid or become payable to his personal representatives or estate by his firm in the event of his death To hold unto the lender absolutely but subject to the proviso for redemption hereinafter contained.

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"2. Provided always and it is hereby agreed that if the mortgagor shall pay to the lender the said sum of 74*l.* 4*s.* 3*d.* together with all interest and other moneys (if any) by any means becoming due hereunder by the instalments at the times and in manner hereinafter provided the lender shall at any time thereafter upon the request and at the cost of the mortgagor reassign the premises hereinbefore assigned to the mortgagor or the person or persons claiming under him or as he or they may direct.

"3. And in further pursuance of the said agreement and for the consideration aforesaid the mortgagor covenants with the lender: (*a*) To pay to the lender the said principal sum of 74*l.* 4*s.* 3*d.* by instalments of 2*l.* per month on the first day in each month the first payment to be made on the first day of August next. . . . . (*d*) That during the continuance of these presents the mortgagor shall diligently and faithfully devote himself to his duties wheresoever he may be employed and will not do or suffer anything to be done which may or might cause him to be dismissed or liable to be dismissed or have his salary reduced but shall use his best endeavours to advance his position wheresoever employed And shall not without the express sanction in writing of the lender determine his engagement with Messrs. Millar's Timber and Trading Company Limited or other his employer for the time being . . . . (*h*) That during the continuance of these presents not to (*sic*) borrow apply for or attempt in any way to borrow or raise any sum or sums of money whatsoever whether on security or otherwise nor part with give away sell settle pledge or otherwise dispose of any of the furniture chattels or other goods and effects now in or about or hereafter to be brought upon his present residence (the whole of the existing household furniture goods and effects being and it is expressly declared by the mortgagor to be his sole and unincumbered property) and not to obtain or endeavour to obtain credit or buy any articles or goods on credit or to be paid for by deferred payments nor to pledge the credit of the mortgagor or permit any other person to pledge his credit (save his wife in the case of ordinary tradesmen's books for weekly settlement, such books to be produced to the lender for his inspection on demand) and also not to enter into any gambling contract bet or wager or become bail or security for or on behalf of any person whatsoever or in any other way make himself or his property answerable for any

sum or sums of money whether legally or morally . . . . (*i*) Not without the consent of the lender in writing first had and obtained to remove from or take any other dwelling-house or residence."

The plaintiff, alleging that Bunyan had committed breaches of the covenants in the indenture, gave notice of the assignment to the defendants on June 24, 1915, and required them to pay to him the moneys thereby assigned as and when they became due. Notwithstanding this notice, the defendants paid Bunyan his salary from the date of the notice sent to them down to November, 1915, when Bunyan joined the Army. Thereupon the plaintiff brought this action.

The judge gave judgment for the defendants, as in his opinion the assignment was conditional and not absolute.

The plaintiff appealed.

On the appeal two points were argued—first, whether the assignment was absolute or conditional, and, secondly, on the point being taken by the Court, whether the contract was not void as being contrary to public policy. It is not considered necessary to report the argument on the first point.

*Rowand Harker*, for the plaintiff. The indenture is not void as being contrary to public policy. A man may lawfully assign the whole of his existing property: *In re Kelcey* (1); and he may assign the whole of his future property of a particular kind: *Harrington* v. *Kloprogge* (2); *In re Clarke* (3); *Tailby* v. *Official Receiver*. (4) The present case comes within the principles laid down in those decisions. Objections to the validity of a contract based upon public policy ought to be carefully scrutinized. In *Richardson* v. *Mellish* (5) Burrough J. said: "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you." That passage was cited with approval by Lord Bramwell in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (6) To hold this contract void as being against public policy would be to do what Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines* (7)

(1) [1899] 2 Ch. 530.
(2) (1785) 2 Brod. & B. 678, n.
(3) (1887) 36 Ch. D. 348.
(4) (1888) 13 App. Cas. 523.
(5) (1824) 2 Bing. 229, 252.
(6) [1892] A. C. 25, 45.
(7) [1902] A. C. 484, 491.

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said the Court is not entitled to do, namely, invent a new head of public policy.

[SANKEY J. referred to the Wages Attachment Abolition Act, 1870, and *Gordon* v. *Jennings*. (1)]

If, however, the Court should take the view that certain of the clauses in the contract are bad they may be severed from those that are good: *Dubowski & Sons* v. *Goldstein*. (2) The clause assigning the mortgagor's salary is clearly good and it may be severed from the other clauses.

*H. J. Rowlands*, for the defendants. The indenture is void as being against public policy. Its enforcement would deprive the debtor and his family of all means of subsistence, for it assigns all his wages, by whomsoever payable, for all time, and therefore all incentive to labour on the part of the debtor is lost; further, he is debarred from borrowing money even on security, and would therefore be unable to obtain food even on credit. The broad principle is that any contract which tends to be mischievous or is opposed to the public welfare is void: *Egerton* v. *Earl Brownlow* (3); and a contract which deprives a man of the means of subsistence is within that principle: *In re Clarke*. (4) "Every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his will": *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland, and Wales* (5), per Darling J., quoting Erle on Trade Unions, p. 12. [He also cited *Mason* v. *Provident Clothing and Supply Co*. (6)] The contract is not severable in the way suggested on behalf of the plaintiff.

*Harker* replied.

LUSH J., after stating the nature of the action and holding on the construction of the indenture that it was intended to operate, and did operate, as an absolute assignment within s. 25 of the Judicature Act, 1873, continued as follows: If the matter rested there the appeal should be allowed, but we have to consider whether the judgment can be supported upon any other ground, for, if it can, we should be

(1) (1882) 9 Q. B. D. 45.
(2) [1896] 1 Q. B. 478.
(3) (1853) 4 H. L. C. 1.
(4) 36 Ch. D. 348, 352.
(5) [1902] 2 K. B. 88, 96.
(6) [1913] A. C. 724.

wrong in setting it aside. The deed in question has been impeached before us on the ground that being contrary to public policy it is invalid. This point was not taken in the Court below, but if it is good we must give effect to it, although I agree with Mr. Harker that this is a line of defence which must be carefully scrutinized. Whether a contract is or is not in accordance with public policy is a question of difficulty and one as to which judicial opinion has fluctuated from time to time. In *Besant* v. *Wood* (1) Sir George Jessel M.R. said: "This is a branch of law which depends upon what is commonly called 'public policy.' Now you cannot lay down any definition of the term 'public policy,' or say it comprises such and such a proposition, and does not comprise such and such another: that must be, to a great extent, a matter of individual opinion, because what one man, or one judge, and perhaps I ought to say one woman also in this case, might think against public policy, another might think altogether excellent public policy. Consequently it is impossible to say what the opinion of a man or a judge might be as to what public policy is." In *Janson* v. *Driefontein Consolidated Mines* (2) Lord Halsbury pointed out that to bring a case within the reach of this principle it must be shown that it falls under some recognized head of invalidity on the ground of being against public policy. Adopting that view and recognizing that we must not create new principles or say that upon some ground never hitherto recognized the particular contract is not in accordance with public policy, it will be necessary to look carefully at this deed to ascertain whether it can fairly be said to be against public policy.

Certain passages in the opinion of Lord Shaw in *Mason* v. *Provident Clothing and Supply Co.* (3) are very valuable in this connection. Lord Shaw called attention to the importance of securing to every person complete freedom so that he may earn his living as best he can, and he added, "This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect"; and he further said this: "But, to use Lord Macnaghten's language in the *Nordenfelt Case* (4), 'There is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment.'

(1) (1879) 12 Ch. D. 605, 620.
(2) [1902] A. C. 484, 491.
(3) [1913] A. C. 737, 738, 739.
(4) [1894] A. C. 535, 566.



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And in my opinion there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work." Again: "It may be that bargains have been entered into with the eyes open, which restrict the field of liberty and of labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee. In every case in which it exceeds that protection, the public interest, which is always upon the side of liberty, including the liberty to exercise one's powers or to earn a livelihood, stands invaded, and can accordingly be invoked to justify the non-enforcement of the restraint. In such a case it may be 'plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed.' This is the language of Lord Campbell in *Tallis* v. *Tallis*." (1)

The question is whether this contract can be said to operate, if I may use a comprehensive term, in restraint of trade; whether it is a contract which unduly and improperly fetters the free disposal of the assignor's labour. If it so restricts it, if it applies such fetters upon it as to make it injurious not only to the man himself but injurious to the public interest, we should be justified in holding, and indeed bound to hold, that the contract is not one which can be enforced at the suit of the plaintiff. I propose, therefore, to examine somewhat more closely the terms of the deed. In it Bunyan is called "the mortgagor" and is described as a clerk in the employment of the present defendants. It recites that the mortgagor is indebted to the various persons mentioned in the schedule and has requested the lender to pay those debts, which the lender agrees to do on having the repayment secured. [His Lordship read clause 1 and continued:] Clause 2 provides for redemption; then follow certain covenants by the mortgagor which go to strengthen the security. Clause 3, sub-clause (*d*), is as follows: "That during the continuance of these presents the mortgagor shall diligently and faithfully devote himself

(1) (1853) 1 E. & B. 391, 412.

to his duties wheresoever he may be employed and will not do or suffer anything to be done which may or might cause him to be dismissed or liable to be dismissed or have his salary reduced but shall use his best endeavours to advance his position wheresoever employed." So far no objection can be taken to that provision, but then follow these words: "and shall not without the express sanction in writing of the lender determine his engagement with Messrs. Millar's Timber and Trading Company Limited or other his employer for the time being." By sub-clause (*h*) the mortgagor covenants not to borrow or attempt to borrow, and not to enter into any gambling contract, bet, or wager. Sub-clause (*i*) says "Not without the consent of the lender in writing first had and obtained to remove from or take any other dwelling-house or residence." If these clauses are indivisible and the deed has to be construed as one entire contract I can come to no other conclusion than that this contract did so unduly fetter and restrict the disposal of the mortgagor's labour, and so unduly restrict him in his mode of living and in choosing the mode of living best adapted for the purpose he had in view, as to be against public policy. In this case I do not know whether it would be right to pray in aid the Wages Attachment Abolition Act, 1870, which prevents an order being made for the attachment of the wages of any servant, labourer, or workman by the judge of any Court of record or inferior Court, inasmuch as it is not clear whether this mortgagor comes within the description of persons affected by the Act. If he came within the class, it would be a very cogent argument in favour of the view that this contract is against public policy that what a county court judge cannot do after judgment this lender can do by the restrictions he has imposed upon the mortgagor. The law has always jealously guarded the right of a servant to the wages he has contracted for, and his right to live free from any restrictions as to the mode in which and the place at which his wages are paid. Of this the Truck Acts afford a good illustration. It may be said that the mortgagor is not a person falling within the class protected in that way, but this contract operates to make him part with the control not only of the wages he is earning from his present employers but of the wages he may earn from any other employer. It restricts him with regard to the service that he may enter if he should be minded to leave his present employers. It restricts him in his choice

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as to serving his present employers or taking some other employment which might suit him better, for he cannot enter other employment without the lender's sanction. The contract thus restricts his opportunities of earning salary or obtaining sustenance, because in view of the assignment the employers could not safely pay the mortgagor for the services he had rendered. The control has been assigned to the lender. The mortgagor is further prevented from pledging his credit. A contract like that is one which it cannot be in the interest of the community to treat as within the competency of the lender and borrower to make. If, therefore, it is an entire and indivisible contract it is bad.

Is the contract entire and indivisible? Mr. Harker said we might separate the bad clauses from those which are good, and he contended that at all events it was competent for the mortgagor to assign all the salary, not only due at the time the deed was executed, but salary which would accrue from the same employers. I was impressed by that argument, and certain authorities have been cited which undoubtedly lend it some support. In *In re Clarke* (1) the Court held that a provision as to the assignment of after-acquired property was divisible and that the security was not invalidated altogether. In other cases in contracts in restraint of trade it has been held that the part that is valid may be separated from that which is invalid. On the whole, however, I have come to the conclusion that this contract is not divisible in the way suggested by Mr. Harker. It is impossible to separate the assignment of the salary from those clauses which restrict the mortgagor from getting other employment if he thought fit—employment that might be more suitable. All those clauses are so necessarily connected that we cannot separate one from the other. I do not say that if the clause preventing the mortgagor, without the lender's sanction, choosing another residence were bad it would necessarily make the assignment of salary bad, but I think the contract is bad because the clause operating as an assignment of the salary is inseparably connected with the provision which compels the mortgagor to earn the salary from those particular employers unless the lender gives his consent to the mortgagor entering other employment. Taking it as a whole the contract is contrary to public policy, and upon

(1) 36 Ch. D. 348.

that ground the judgment for the defendants must stand and the appeal be dismissed.

SANKEY J., having stated that he agreed that the contract in question was an absolute assignment, continued as follows: I now come to the second point, Is the contract illegal as being against public policy, or rather, as I should prefer to put it, is the contract illegal as being in restraint of trade? I approach this subject with considerable hesitation, bearing in mind the words of Burrough J. in *Richardson* v. *Mellish* (1) where he described public policy as an unruly horse. Later, Sir George Jessel M.R. in *Printing and Numerical Registering Co.* v. *Sampson* (2) said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Again, in *In re Mirams* (3) Cave J. said: "Certain kinds of contracts have been held void at common law on this ground [i.e., of public policy]—a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." In cases, however, of restraint of trade it is the duty of the Court to consider the rights of the public as well as the rights of the parties. The most recent authority for that proposition is the judgment of Lord Parker in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (4), where he said: "There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts

(1) 2 Bing. 229, 252.
(2) (1875) L. R. 19 Eq. 462, 465.
(3) [1891] 1 Q. B. 594, 595.
(4) [1913] A. C. 781, 794.

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has, however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in the case of *Nordenfelt* v. *Maxim Nordenfelt Co.* (1) For a contract in restraint of trade to be enforceable in a Court of Law or Equity, the restraint, whether it be a partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal C.J. in *Horner* v. *Graves* (2) ) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Those, as I conceive, are the general principles of the law bearing upon restraint of trade. We have also had the following passage cited to us, which, however, is no more than a dictum, from the judgment of Cotton L.J. in *In re Clarke* (3) : " Again, a contract may be so wide that the Court might consider it wrong to enforce it—wrong on the ground that if fully carried into effect it would prevent the party from paying his debts, and deprive him of the means of subsistence."

I now consider the position of the parties in this case. I observe that Bunyan, the mortgagor, is described as a clerk, and I observe, further, that the assignment is of " all that the salary or wages now due or henceforth to become due to him the mortgagor," and so on. As Lush J. has pointed out, the wages of workmen have always been most jealously protected by the law. The Truck Act was passed in order to ensure that workmen should get their wages, as it is said in the Act, in the current coin of the realm. Further protection was given by the Wages Attachment Abolition Act, 1870, where it is enacted that " no order for the attachment of the wages of any servant, labourer, or workman shall be made by the judge of any

(1) [1894] A. C. 535. (2) (1831) 7 Bing. 735.
(3) 36 Ch. D. 348, 352.

Court of record or inferior Court." In this case I agree that we are not in a position to say whether the mortgagor was a servant, labourer, or workman, but I use the Act as indicating the policy of the law in regard to the wages of workmen. The same policy is again shown by the Preferential Payments Acts, under which workmen are entitled up to a certain amount to a first charge upon the assets in respect of their wages.

That being the policy of the law, I turn again to the contract in this case. By clause 3, sub-clause (*h*), it is provided that the mortgagor during the continuance of the contract is not to borrow any money, or dispose of his furniture, chattels, or other goods, or obtain or endeavour to obtain credit, or enter into any gambling contract, bet, or wager, or become bail or surety for any person, or in any other way make himself or his property answerable for any sum or sums of money whether legally or morally. If this man has children it would be impossible for him by reason of this provision to discharge the moral obligation resting upon him to provide for their maintenance. A further clause in the contract provides that the mortgagor will not without the consent of the lender " remove from or take any other dwelling-house or residence." In fact, the effect of this deed is not only to attach the mortgagor's salary or wages, but to tie up and unduly restrict his personal freedom. Upon this point Lord Shaw in *Mason* v. *Provident Clothing and Supply Co.* (1) said : " My Lords, conflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power and with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it ? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect." He added : " No workman could have the freedom to dispose of his own labour, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause " ; and he proceeded to say that the agreement in that case

(1) [1913] A. C. 724, 737, 741.

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was wider than was reasonably necessary for the company's protection. I am of opinion that this agreement is void for reasons of that kind.

I was impressed by Mr. Harker's contention that the covenants were divisible. He said that, assuming that there are certain clauses which are illegal, it is quite possible to sever them from those that are legal and to give effect to the latter, upon one of which the present claim is based. For that proposition he cited *Dubowski & Sons* v. *Goldstein.* (1) There is no doubt about the proposition itself; I am, however, doubtful whether the particular clause upon which Mr. Harker relies is legal, but, whether it is so or not, I think the illegal clauses are so many and so mixed up with the legal clauses that it is impossible to separate them or to apply to them the divisibility doctrine. In those circumstances, although, as I have said, I approach cases of public policy with hesitation, I think that this contract is illegal, and on that ground I agree that the appeal should be dismissed.

*Appeal dismissed; leave to appeal.*

Solicitors for plaintiff: *Barnes & Butler.*
Solicitors for defendants: *White & Leonard.*

(1) [1896] 1 Q. B. 478.

J. S. H.

## SANATORIUM, LIMITED *v.* MARSHALL.

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*April* 5, 18.

*County Court — Practice — Misdirection — New Trial — Jurisdiction of County Court Judge to grant New Trial — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

After the trial of an action before a county court judge without a jury an application was made to him for a new trial. The county court judge having come to the conclusion that at the trial he had misdirected himself, granted the application, directing the new trial to take place with a jury :—

*Held*, that the county court judge had jurisdiction to order the new trial.

APPEAL from the judgment of the judge of the Croydon County Court.

The action, which was brought by the plaintiffs to recover damages from the defendant for breach of warranty, on the sale of a horse, was commenced in the High Court, but was ordered by a Master to be tried at the Croydon County Court. The trial took place before the county court judge without a jury, when the judge gave judgment for the plaintiff for 24*l.*, finding that the horse was unsound in that it was suffering from broken wind at the time of delivery. In the course of his judgment the county court judge held that the horse had a cold when delivered and that the symptoms progressed, and that it was open to him from that fact to come to the conclusion that it was at the time of delivery showing symptoms of broken wind, which became progressively worse.

The defendant applied to the county court judge for a new trial upon the ground that the judge misdirected himself as to the breach of warranty, in that (inter alia) the veterinary evidence showed that the term " broken wind " is well understood in veterinary science as descriptive of a definite condition in which certain well-ascertained symptoms appear, and there was no evidence of any of those symptoms.

The county court judge granted a new trial, to be before a jury, and in his notes of the application said : " I confess on considering my decision in this case I felt misgiving as to whether on the evidence I ought to have come to the conclusion I did. . . . . I have no

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power to reverse a decision, but if I have misdirected myself I can order a new trial. Misdirection of self . . . . is . . . . that the fact that the horse had a cold at the time when it was delivered could denote a condition of broken-windedness. I think in that respect I did misdirect myself, and I could not come to the conclusion that because the horse had a cold it was at that time broken-winded, and I can on that ground direct that there should be a new trial, not reversing my judgment, but holding that I misdirected myself and drew an inference of fact which could not be drawn. I think that on the evidence given the Divisional Court would grant a new trial, or possibly enter judgment for the defendant."

The plaintiffs appealed upon the ground (inter alia) that the application for a new trial was in effect an appeal to the county court judge to reverse his finding of fact.

*T. Beresford*, for the plaintiffs. The county court judge had no power to order a new trial. Whether the horse was unsound or not was a pure question of fact, and so the Divisional Court could not have interfered. The county court judge could not order the new trial: *Clarke* v. *West Ham Corporation*. (1) The proper course for the defendants to take was to appeal to the Divisional Court and not to apply to the county court judge for a new trial. [*Brown* v. *Dean* (2) was also referred to.]

*Cassels*, for the defendant. The county court judge thought he had made a mistake and that there had been a miscarriage of justice. In an exceptional case of that kind the High Court will grant a new trial, and therefore the county court judge had jurisdiction to do so, even though the question was purely one of fact, i.e., whether the cold denoted broken wind. There is nothing in *Brown* v. *Dean* (2) which is in conflict with that proposition. If the case had been tried with a jury, and the county court judge had told them that it was open to them to find that the horse was broken-winded because it had a cold, it would have been misdirection, and he misdirected himself in that sense, because he in effect put that question to himself. He has not reversed his judgment and there-

(1) [1914] 2 K. B. 448. (2) [1910] A. C. 373.

fore *Clarke* v. *West Ham Corporation* (1) does not apply. [*Jones* v. *Spencer* (2) was also referred to.]

*Beresford* replied.

*Cur. adv. vult.*

April 18. The following judgment of the COURT (Lush and Sankey JJ.) was read by

SANKEY J. The judgment which I am about to read is the judgment of the Court. This is an appeal from a county court judge, who has ordered a new trial of an action which came before him, in which he gave judgment for the plaintiffs for damages for breach of warranty in respect of the sale of a horse. The main point in the case was whether the horse was broken-winded and so unfit for work. An application was made to the learned judge by the defendant for a new trial, and he granted it. In giving his decision the learned judge said [Having read the extract from the notes made by the county court judge above set out, his Lordship continued :]

The plaintiffs, who are appellants, contend that the learned judge had no jurisdiction to act as he did, and it therefore becomes necessary to examine what powers a county court judge has, under such circumstances. They are derived from s. 93 of the County Courts Act, 1888, which, after declaring that "every judgment . . . . except as in this Act provided, shall be final and conclusive between the parties," enacts that "The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

This power is one which has been entrusted to county courts from very early times, and will be found set out in almost identical words in s. 89 of the County Courts Act, 1846 (9 & 10 Vict. c. 95), entitled "An Act for the more easy Recovery of Small Debts and Demands in England." The section itself contains two propositions which at first sight may seem to conflict, namely, that the judgment of the judge shall be final, but, secondly, that he shall have power, if he think just, to order a new trial. The matter has, however,

(1) [1914] 2 K. B. 448. (2) (1897) 77 L. T. 536.

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received judicial interpretation, and the result of the cases seems to be as follows :—

(1.) When a judge has made up his mind and given his decision, he cannot change his mind and reverse his decision merely because he is dissatisfied, or thinks better of it. There is no place of repentance for him. The authorities for this are—(*a*) *Irving* v. *Askew* (1), where it is stated that a judge cannot change his mind ; (*b*) *Brown* v. *Dean* (2), where it was held that a judge cannot grant a new trial in a case where he does not suggest that the former decision was wrong but considers that the case was one of the gravest doubt.

(2.) The power to order a new trial must be exercised judicially, and the order can only be made on grounds which are in the High Court sufficient in law for making it : see *Murtagh* v. *Barry* (3), approved in *Brown* v. *Dean* (4) in the Court of Appeal and in the House of Lords.

(3.) A county court judge, when he has once decided that there is a case to go to the jury, cannot grant a new trial upon the ground that there was no case to go to the jury, for the proper remedy in such circumstances is to enter judgment for the defendant, and that the judge has no power to do : see *Robinson* v. *Fawcett & Firth* (5) and *Clarke* v. *West Ham Corporation.* (6)

Applying those rules to the above facts, it is necessary to consider whether the High Court would have the power to grant a new trial in the present circumstances. In our view it would. If the learned judge had been trying this case with a jury, and had misdirected them, it is clear that the High Court could have ordered a new trial. Just as a county court judge can misdirect a jury, so he can misdirect himself: see *Barry* v. *Minturn* (7), where Lord Parker of Waddington says : " Under these circumstances it is clear that the only ground for directing a new trial is that the county court judge misdirected himself . . . ."

It appears to us, therefore, that if the county court judge did misdirect himself there would be power in him to grant a new trial. Over and above that, one of the rules of the High Court under which

(1) (1870) L. R. 5 Q. B. 208.
(2) [1910] A. C. 373, 375.
(3) (1890) 24 Q. B. D. 632.
(4) [1909] 2 K. B. 573; [1910] A. C. 373.
(5) [1901] 2 K. B. 325.
(6) [1914] 2 K. B. 448.
(7) [1913] A. C. 584, 594.

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a new trial can be granted is where substantial wrong or miscarriage has been occasioned in the trial owing to a mistake of the judge, as, for example, where the attention of the jury is not directed to the whole of the facts of the case, or the Court is not satisfied that the real question to be determined was so left to them that their verdict was given upon that question : *Jones* v. *Spencer*. (1) This case is exceptional. We have the very categorical statement of the learned judge already referred to that he made a mistake and did misdirect himself.

We think that he was right in making that statement and was entitled to give effect to it. Under these circumstances he had jurisdiction to order a new trial and the appeal must be dismissed.

*Appeal dismissed.*

Solicitor for appellant : *A. Ross Dagg.*

Solicitors for respondents : *F. Foss & Sons.*

J. E. A.

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[IN THE COURT OF APPEAL.]

## SCOTT *v.* PEARSON.

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*March* 15, 24, 31.

*Employer and Workman—Compensation—Farm Servant—Injury by Accident—Contraction of Non-industrial Disease—Cattle Ringworm —Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A woman employed as a farm servant to tend and feed calves contracted cattle ringworm, a contagious disease with which the calves were infected, and was thereby incapacitated for work. She claimed compensation under the Workmen's Compensation Act, 1906, on the ground that she had sustained an "injury by accident." It was admitted that the calves were infected with the disease, which was not an industrial disease within the Act. At the suggestion of the county court judge the cross-examination of the applicant and her witnesses was reserved. The judge thereupon awarded in favour of the employer on the ground tha no injury by accident had been proved :—

*Held*, on appeal, that the disease might have been caused by an accident or series of accidents as in *Brintons, Ld.* v. *Turvey* [1905] A. C. 230, and that the facts had not been sufficiently ascertained for the determination of the question. If a definite time, place,

(1) 77 L. T. 536.

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and occasion could be assigned for the contracting of the disease, and if the occasion were a part, but an unusual part, of the employment, an illness so produced might be deemed an "injury by accident." The case must be remitted to the county court for further trial.

APPEAL from an award of the judge of the Alnwick County Court in an arbitration under the Workmen's Compensation Act, 1906.

The applicant, Mary Jane Scott, was a young woman employed as a farm servant by the respondent, John William Pearson. Part of her duty was to look after and feed calves which were kept in an inclosure. Early in February, 1915, she noticed scabs on the neck and head of one of the calves, and on February 13 she found scabs on her own arm. It appeared that in feeding the calves she sometimes had to push them back with her hands or with a stick into their pen when they crowded against her. It was admitted by the respondent that the calves had cattle ringworm, and on February 15 a certificate was given by a medical practitioner stating that the applicant was "rendered incapable of work by reason of taenia circinata of forearm infected from cattle." This disease consisted of a fungus growth and was contagious.

The applicant applied for an arbitration under the Act, claiming compensation during incapacity from February 13, 1915, on the ground that she had been injured by an accident arising out of and in the course of her employment by the respondent. The respondent denied his liability to pay compensation on the ground that the alleged injury to the applicant was not caused by accident arising out of and in the course of her employment. In the county court neither the applicant nor her witnesses were cross-examined, the cross-examination being, at the suggestion of the learned judge, reserved. He held that no injury by accident had been proved, and accordingly made an award in favour of the respondent.

The applicant appealed.

*Holman Gregory, K.C.*, and *Fletcher* (for *Basil Watson*, serving with His Majesty's Forces), for the appellant. The learned county court judge has misdirected himself and there ought to be a new

trial. There are in this case all the elements of an injury by accident within the meaning of the decisions: *Glasgow Coal Co.* v. *Welsh* (1); *Fenton* v. *Thorley & Co.* (2)

*Brintons, Ld.* v. *Turvey* (the anthrax case) (3) is conclusive of the present case; see also *Ismay, Imrie & Co.* v. *Williamson.* (4) There are two cases which may seem to be contrary to our submission, but in both of them no one could say that the disease was contracted in the course of the employment—*Eke* v. *Hart-Dyke* (5) and *Martin* v. *Manchester Corporation* (6); see also *Burvill* v. *Vickers, Ld.* (7)

*Shakespeare*, for the respondent. Unless it can be said that in every case the contracting of a disease is an accident, it is submitted that there is nothing in the facts of this case to oblige the county court judge to find that there was a personal injury by accident. *Fenton* v. *Thorley & Co.* (2) did not decide that merely contracting a disease was an accident. In *Brintons, Ld.* v. *Turvey* (8) the majority of the noble and learned Lords were careful to show that there was an accidental occurrence. It was an accident that the source of infection was in a place where it was not expected to be. Lord Macnaghten dealt with that point in a way which would have been unnecessary if in the opinion of the House the mere contracting of a disease was an accident. In *Broderick* v. *London County Council* (9), where a workman contracted enteritis from inhaling sewer gas in the course of his employment, it was held that there was no "injury by accident" within the meaning of the Act. In *Eke* v. *Hart-Dyke* (5) it was held that unless the applicant, in a case of non-industrial disease, can indicate the day, time, circumstance, and place in which the accident occurred which occasioned the disease, by means of some definite event, "injury by accident" cannot be established. There is no definite event here by means of which such particulars can be indicated. In *Martin* v. *Manchester Corporation* (6) the county court judge found that the man had contracted the disease on a particular day, but the Court of Appeal

(1) [1916] 2 A. C. 1.
(2) [1903] A. C. 443.
(3) [1905] A. C. 230.
(4) [1908] A. C. 437.
(5) [1910] 2 K. B. 677.
(6) [1912] W. N. 105; 5 B. W. C. C. 259.
(7) [1916] 1 K. B. 180.
(8) [1905] A. C. 230, 234.
(9) [1908] 2 K. B. 807.

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held that he was wrong and that there was no injury by accident. In *Glasgow Coal Co.* v. *Welsh* (1) the workman had unexpectedly to deal with the water in the pit; the water being there was an accident.

No case of misdirection has been made out, and the appeal ought to be dismissed.

*Holman Gregory, K.C.*, in reply. In the cases cited for the respondent the basis of decision was that the employment necessarily involved exposure to risk of the disease, and if the disease were contracted it was no accident. There is no evidence here that one of the risks incurred by the applicant was that of infection with disease from the cattle. It was not to be anticipated that the calves would have a disease which human beings would be likely to catch. Here, as in *Brintons, Ld.* v. *Turvey* (2), the accident consisted in a series of accidents. It was an accident that the calves got the disease; it was an accident that the girl came in contact with a spore of the disease; it was an accident that the spore alighted upon a portion of the girl's body which was favourable for the germination of the disease. On the facts of this case, in law the applicant sustained an "injury by accident."

*Cur. adv. vult.*

March 31. LORD COZENS-HARDY M.R. The applicant in this case is a young woman who was employed as a farm servant. It was her duty to look after and feed young calves. It is admitted that the calves had ringworm in the early part of February. On February 13 she noticed that her arm was breaking out in scabs. The doctor whom she consulted reported that it was a case of "cattle ringworm," which is distinguishable from ordinary ringworm. It is a fungus growth. It might be contracted from the calves, who would be likely to push against her, or it might be conveyed by a stick used by her to keep the cattle in their pen.

The applicant and her father and the doctor were all examined, and their evidence was to the effect above stated. But the cross-examination of each witness was, by the judge's direction, "reserved," and there was no cross-examination, for the learned county court judge did not call upon the respondent. His own note

(1) [1916] 2 A. C. 1. (2) [1905] A. C. 230,

of his judgment is as follows: "I was of opinion on the above facts that the applicant had not proved an injury by accident, and therefore made my award for the respondent." His view apparently was that it was a case of disease, and not an industrial disease within s. 8, and that therefore there could be no "injury by accident."

With great respect I think this is an error. The *Anthrax Case* (1) is decisive on this point. The very recent case in the House of Lords of *Glasgow Coal Co.* v. *Welsh* (2), decided on the 6th of the present month, is a strong instance. A miner contracted rheumatism and recovered compensation in the following circumstances. He was employed as a brusher. But water had accumulated in the pit, and he was directed to bale it out. To do this he had to stand for eight hours up to his chest in the water. This was followed by a severe attack of rheumatism. The sheriff-substitute found that this was an accident arising out of his employment; and the House of Lords dismissed the employers' appeal.

It by no means follows that the applicant will establish her claim to an award when the case is fully tried out. But assuming that the statements of the witnesses are the truth—as the learned judge assumed—I think there was a case which called for an answer by cross-examination, and probably by direct evidence. The notes with which we have been furnished, including a letter written by the county court judge, are meagre. It is not suggested that the period between the appearance of cattle ringworm in the calves and February 13 was either too long or too short for the recognized period of incubation, whatever it may be, or that the young woman had been in contact with other diseased cattle in addition to the calves. The applicant will have to satisfy the arbitrator that there was an accident within the meaning of *Fenton* v. *Thorley & Co.* (3), namely, contact with the diseased calves, either direct, or indirect through a stick, at a date fixed with reasonable certainty, and that such accident conveyed the cattle ringworm to her. If these facts are established, there is no legal difficulty in making an award in her favour.

In my opinion the case must go back to the county court judge for a complete trial.

(1) [1905] A. C. 230. (2) [1916] 2 A. C. 1.
(3) [1903] A. C. 443.

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PHILLIMORE L.J. The applicant is a girl in farm service, and it was part of her duty to look after some calves. How long she had been in service does not expressly appear, but we were told from the previous May. In the month of February, 1915, she noticed that one of the calves (according to the note of the county court judge), or the calves generally (according to a newspaper report of which the judge approves), had scabs on the neck and head.

She had to feed these calves, and they were in some sort of pen, and used to push forward in order to get out when she came to feed them, and she had to push them back. For this purpose she sometimes used a stick, but sometimes her hand, and in this way she had occasionally touched them, presumably on the neck and head, if they were pushing to get out. On February 13 she noticed her arm was breaking out in scabs, and on the 15th she saw a doctor and was under him for some little time. After evidence had been called to show that the calves had ringworm, it was admitted for the employer that they had it. The doctor proved that she had cattle ringworm and gave her a certificate that she had "taenia circinata of forearm infected from cattle." He said that the disease is a fungus. On the opening of the case for the applicant the judge, we are told, expressed a view that, assuming the facts to be as stated, the case was not one of injury by accident, and at his suggestion the evidence for the girl was left as deposed to in chief without cross-examination. At the conclusion of that evidence he gave judgment against her, stating, according to the note which he signed, as follows: "I was of opinion on the above facts that the applicant had not proved an injury by accident, and therefore made my award for the respondent." The notes are very short, and it was suggested to us that there was a fuller report in a newspaper, which was indeed verified by affidavit. We did not think it right, without consent of both sides, to refer to this newspaper; but we made a communication to the learned judge, who has replied that his notes contain all that is material, but that he has sent us an account in another newspaper which might be used to supplement them. And it is from the two that I have extracted this very meagre statement of facts. From it, assuming the evidence to be believed, I deduce these inferences: That the girl got the ringworm from the calves, and got it by contact with them in the way and on the occasions which she has

described. That the ringworm was not chronic with the cattle: possibly it had come on somewhere about, or shortly previous to, the early part of February.

I must say that I regret that the case was taken so shortly and recorded so briefly. But it is possible that we have, even so, materials enough to enable us to decide whether the learned judge was right in taking a summary view that the applicant, on her own evidence, had proved no case, or whether the matter should go back for further investigation.

Now that "idiopathic disease," to use the language of Lord Halsbury in the anthrax case (*Brintons, Ld.* v. *Turvey* (1)), though developing in the course of employment, is not an accident is well established. This is so even if the disease is an usual result or concomitant of the employment, such as a disease produced by sedentary habits, or scriveners' palsy, or poisoning of a workman ordinarily employed in sewage by sewage gas, as in *Broderick* v. *London County Council* (2), unless the disease be one of the industrial diseases to which s. 8 of the Act applies, and unless the conditions prescribed by that section have been complied with. On this principle, if the disease in question was one incidental to all ordinary dealings with cattle, if, for instance, a milkman or milkmaid had such tender skin that milking was injurious, or if a carter had horse asthma, the contraction of such a disease in the ordinary course of his employment could not be an accident. On this principle the case of *Petschett* v. *Preis* (3), where a hairdresser, who had to use a dry shampoo, suffered from dermatitis on the hands, was decided. Also it is true that the contraction of any infectious disease which is common to all mankind and has no connection with any particular employment is not an accident. Take scarlet fever, for instance. Such an illness may be ruled out on either of two grounds: (1.) Because there is no certainty that the workman contracted it in the course of his employment, and that it is the duty of the applicant to show a definite occasion, place, and time on which the disease was contracted: see *Martin* v. *Manchester Corporation* (4); also *Eke* v. *Hart-Dyke.* (5) (2.) On the

(1) [1905] A. C. 230.
(2) [1908] 2 K. B. 807.
(3) (1915) 8 B. W. C. C. 44.
(4) 5 B. W. C. C. 259.
(5) [1910] 2 K. B. 677.

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ground that such an illness may be one of the ordinary evils of mankind.

But it appears that if a definite time, place, and occasion can be assigned for the contraction of a disease, and if the occasion was a part, but an unusual part, of the employment, an illness so produced may be deemed an injury by accident. This, I think, is the result of the recent decision in the House of Lords in *Glasgow Coal Co.* v. *Welsh.* (1) And, at any rate, it is an injury by accident arising out of the employment when a bacillus of infection, emerging from goods which it is the duty of the workman to handle, impinges upon part of the workman's body which happens at the moment to form a suitable nidus for the infecting germ. This is the *Anthrax Case* (2) to which I have referred.

Now it seems to me that upon these principles the case should be decided in favour of the applicant. There was here a series of accidents. It was not usual for the calves to have ringworm. It happened that one or other of these calves, pushing to get out, very possibly, when the girl had not a stick, or had not it handy, brought an infected portion of its body into contact with an infectable portion of the girl's body. The impinging of a spore of a fungus, if it comes accidentally into contact with a suitable nidus, is merely a case of vegetable contact, whereas the bacillus of anthrax may be said to be an animal contact, and a spark of steel coming into the eye may be a mineral contact.

But it is said—and one always hears this argument (and properly so) from counsel for the respondent on an appeal—that the county court judge has decided the matter upon the question of fact. I think that is not so. The facts were not in dispute. He does not mean that he disbelieved the girl's evidence, or did not accept the medical testimony. His judgment means that, accepting all this, the case does not appear to him to come within the legal category of an accident or an injury by accident.

As to the power of a Court of Appeal in these circumstances, see *Gane* v. *Norton Hill Colliery Co.* (3) and Earl Loreburn's judgment in *Blair & Co.* v. *Chilton.* (4)

(1) [1916] 2 A. C. 1.
(2) [1905] A. C. 230.
(3) [1909] 2 K. B. 539.
(4) (1915) 8 B. W. C. C. 324.

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I think that this appeal should be allowed, and that the case should be sent back to the county court judge.

SARGANT J. I agree that this case should be retried. It seems to me that the learned county court judge did not sufficiently recognize the possibility that the disease here might be a disease caused by an accident, or by a series of accidents, within the principle of the anthrax case (*Brintons, Ld.* v. *Turvey* (1)), and that he has accordingly failed to ascertain the facts necessary for determining the question.

Solicitor for appellant: *A. E. Pratt, for Charles Percy & Sons, Alnwick.*

Solicitors for respondent: *William Hurd & Son, for Watson, Burton & Corder, Newcastle-upon-Tyne.*

G. A. S.

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[IN THE COURT OF APPEAL.]

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## STEVENS *v.* THORNE & CO.

*Employer and Workman—Injury by Accident—Compensation—Arbitration—Particulars—Nature of Injury—Allegation of further Independent Injury—Amendment of Particulars—Jurisdiction—Appeal—Right to raise Points of Law not made at Hearing—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Upon an appeal from an award in an arbitration under the Workmen's Compensation Act, 1906, points of law not taken at the hearing before the county court judge cannot be raised in the Court of Appeal.

*Payne* v. *Clifton* (1910) 3 B. W. C. C. 439 and *Harlock* v. *Owners of the Coquet* (1914) 7 B. W. C. C. 88, 90, followed.

A workman claimed compensation in respect of an injury by accident arising out of and in the course of his employment and in the particulars of his claim described the nature of the injury as "rupture." The employers had paid compensation for eight months and then offered the man light work and reduced compensation. He refused this offer and commenced the proceedings for arbitration. At the hearing he further complained of an injury to his back, of which no notice had been given to the employers.

(1) [1905] A. C. 230.

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The medical evidence proved that the alleged injury to the back was independent of, and not causally connected with, the rupture. The county court judge, having heard the evidence, held that the workman was only entitled to a declaration of liability in respect of the rupture, and to this the employers were willing to submit. The applicant then asked for leave to amend his particulars so as to enable him to claim in respect of the injury to the back. The employers objected that as, prior to the arbitration, no dispute had arisen as to the alleged injury to the back, the county court judge could not allow an amendment in respect of a matter as to which he had no jurisdiction to make an award. The county court judge upheld the objection and refused to allow the amendment :—

*Held*, that his decision was right.

APPEAL from an award of the judge of the City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, who was a labourer employed by the respondents, on December 16, 1914, while carrying a bag of cement across a plank slipped and sustained a rupture. The respondents paid him compensation in respect of total incapacity down to August 16, 1915, and then offered him light work and proposed to reduce the compensation. The applicant then commenced these proceedings for an arbitration under the Act. In his application and particulars he described the nature of the injury in respect of which he claimed compensation as "rupture." It was proved at the hearing, which took place before the judge and a medical assessor, that by August 16, 1915, the applicant had recovered from the rupture, but that he was still prevented from working by some injury to his back which it was alleged had resulted from the accident. It was stated by the medical assessor that this injury had no connection with the rupture and could not, either directly or indirectly, have arisen out of it. It was submitted on behalf of the respondents that inasmuch as the only claim was in respect of the rupture they had no case to meet. They admitted that the applicant was entitled to a declaration of liability. Counsel for the applicant then asked for leave to amend the claim and particulars by asking for compensation in respect of the injury to the back. The learned county court judge refused to allow an amendment and made a declaration of liability in respect of the rupture, ordering the applicant to pay the costs.

The applicant appealed on the following grounds :—The

learned judge was wrong in law in holding (1.) that an amendment was necessary; (2.) that he had no power to amend the particulars as to the nature of the injury; (3.) that, having regard to the statement of the nature of the injury in the said particulars, he had no power to accept medical evidence of the applicant as to injury to the applicant's back.

*Rigby Swift*, K.C., and *J. A. Slater*, for the appellant. No amendment of the particulars is necessary where they accurately state the nature of the injury but do not accurately state its effects. *Sidney* v. *W. Collins, Son & Co.* (1) is directly in point as to this. But assuming that any amendment was required, the judge had full jurisdiction to allow it. He ought to have allowed the amendment and adjourned the case to give an opportunity for a further medical examination. Under the circumstances there should be a new trial and the costs should abide the result.

*Ellis Hill*, for the respondents. The learned county court judge was quite right in the course which he took. The only appeal to this Court is from a decision on a point of law, and there is none such here. It was not contended in the Court below that amendment was unnecessary—indeed, leave to amend was asked for. That is a new point which cannot now be raised in this Court: *Payne* v. *Clifton* (2); *Smith* v. *Baker & Sons*. (3) The judge did not decide that he had no jurisdiction to allow the amendment, but only, in the exercise of his discretion, that it would be unjust to the respondents to allow the applicant to amend and proceed with the hearing without adjournment. The only issue in dispute was as to the applicant's continued incapacity due to the rupture. The question of the injury to the back has never been in dispute between the parties. The jurisdiction of the county court judge as arbitrator under the Act is dependent upon the existence of a dispute: *Higgins* v. *Poulson*. (4) The judge had no power to amend by allowing the applicant to allege an injury which had never been mentioned before. If the award stands the applicant will still be able to make a fresh claim in respect of the alleged injury to the back. The order as to costs was right, inasmuch

(1) (1910) 3 B. W. C. C. 433.
(2) 3 B. W. C. C. 439.
(3) [1891] A. C. 325.
(4) (1911) 5 B. W. C. C. 66.

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as the applicant only obtained a suspensory award which the respondents never objected to : *Higgins* v. *Higgins & Co.* (1)

*Rigby Swift, K.C.*, in reply. I rely on *Sidney* v. *W. Collins, Son & Co.* (2) as showing that no amendment was necessary here. There is nothing in the appeal section, Sched. II. (4.), to limit the appeal to points taken in the Court below. *Smith* v. *Baker & Sons* (3) was decided upon s. 120 of the County Courts Act and does not apply to cases under this Act. No reasons are given for the decision in *Payne* v. *Clifton* (4), which is an unsatisfactory case. If the award stands the workman may lose his right to compensation in respect of the injury to his back.

March 24. LORD COZENS-HARDY M.R. This appeal has developed as it went along. At an early stage I thought it was a difficult point, but, having listened to the able arguments of counsel on both sides, I have come to a conclusion which is satisfactory to my own mind. First of all I wish to clear up the point which seemed for the moment to have startled Mr. Rigby Swift—namely, that he ought not to be at liberty to raise in the Court of Appeal points which had not been taken in the Court below. When he was faced with the judgment in *Payne* v. *Clifton* (4) he did not seem quite satisfied, because no special reasons were given for the decision. It was a commendably brief judgment, but that was because the point had been settled again and again in this Court. I will only refer to the recent case of *Harlock* v. *Owners of the Coquet*. (5) That was an appeal from his Honour Judge Rentoul, and it was contended in argument before us that the learned county court judge ought to have made a suspensory award or a declaration of liability. Nothing was said in the county court judge's note with regard to this point, and we referred the matter to him to say what had happened with regard to it. The President of the Probate, Divorce, and Admiralty Division, who gave the leading judgment, there said : " We have been favoured with a reply from his Honour Judge Rentoul, and it is to the effect that he has no recollection or note that a suspensory award or declaration of

(1) [1916] 1 K. B. 640; 9 B. W. C. C. 122.
(2) 3 B. W. C. C. 433.
(3) [1891] A. C. 325.
(4) 3 B. W. C. C. 439.
(5) 7 B. W. C. C. 88, 90.

liability had been asked for. (Cozens-Hardy M.R. We must hold that the point, not having been taken below, is unarguable here.)" Then the President, after stating what his Honour Judge Rentoul had said, says: "The county court judge says his recollection, and also that of his clerk, of what took place does not support the applicant's contention. It, therefore, cannot be taken here." I am sure there are a number of authorities on that point in the books. That gets rid of a good deal of Mr. Rigby Swift's argument, but not quite the whole of it.

In the present case, the workman undoubtedly met with an accident and was ruptured as a result of the accident, and he was paid compensation for a long time in respect of that rupture. The time came when the employers thought that the consequences of the rupture had been removed; a proper truss in place of an improper truss was used, and in the view of the employers the inability to work due to the rupture had come to an end. That was not the view which the man took. As late as September 11, 1915, he took the view that the nature of the injury, which he then described as rupture, had not ceased, and that he was still totally incapacitated, duration uncertain, and he asked that instead of having his compensation stopped on August 16 he should have an award of 15*s.* 6*d.* per week from that date to continue during incapacity. That was the matter which came before the county court. The man also complained of pains in his back. The doctor thought at first they were due to lumbago, and for a long time it was so stated in the doctor's certificates, but in the last certificate which was given to the man in August it is described as "injury to the back." Then in the claim on September 11 the nature of the injury was stated to be rupture. If it could have been made out that the pains in the back were the result of the rupture or sprang out of the rupture, I am not prepared to say that it would not have been quite open to the workman to bring in a claim in respect of that injury under this present application; indeed, I think it would. The case went before the learned county court judge and evidence was given, and it is quite obvious that Mr. Slater, who argued the case for the workman, expected to prove that which I have suggested. The evidence, however, broke down hopelessly. The learned county court judge gave a homely illustration of its effect when he

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Lord Cozens-Hardy M.R.

said "you might as well say that a broken arm was the consequence of a broken leg." The medical referee also said that there was no connection between the two injuries, and that, although there may be two results of the one accident, the rupture was not connected causally with the injury to the back. The learned judge heard the evidence and was satisfied that the workman was not entitled to anything more than a nominal award or declaration of liability in respect of the rupture, and there is no appeal from that part of his decision. The question then arose whether this matter of the pains in the back should be introduced by amendment, with the result that the case would either go on or be adjourned for further discussion. I should say that the certificates to which I have referred were never shown to the other side. So far as appears there was no notice of the injury to the back at all. At the hearing objection was taken by the respondents that they had come there to deal with a case of rupture only. And they said that there had never been a dispute between the parties about the injury to the back, and that the learned judge's jurisdiction as an arbitrator did not arise until there was a dispute, as was quite clear from the language of the Act itself; and they contended, therefore, not that the learned county court judge had no jurisdiction to amend, but that he could not by amendment introduce a matter in respect of which he had no jurisdiction to make an award. There was then a discussion between the parties as to whether it would be more convenient that the employers should consent to an amendment, and then counsel said "Upon terms it might be to my interest," one of the terms being, if the amendment was allowed, that there should be an adjournment, but that it ought to be allowed only on condition that the man first paid the costs of the proceedings so far; but counsel, who argued the case for the workman with great propriety and ability, did not like that term and was not prepared to accept it. I think it is very unfair to the learned judge to say that he decided, as a matter of abstract law, that he could not allow an amendment. In the exercise of his discretion he said that he ought not to allow an amendment, and I think he also went so far as to say that if the point in respect of which an amendment was desired was one upon which there had been no dispute, that was a matter upon which he ought not to allow an amendment.

I think he was right on both those points. He also said that if he dismissed the application and only made a declaration of liability the workman could come again. This is a point upon which I confess at first I had some doubt and difficulty. I had not then had my attention called to the terms of the notice of claim; and in any case it is not disputed by counsel for the respondents that, notice of accident having been given within a reasonable time, this separate and independent injury to the back, if it be an injury arising out of the accident, is one which can be brought forward, and there can be no kind of estoppel raised against the applicant by reason of the disposal of the present case, which is simply one for rupture. That being so, what ought we to do? It seems to me that we ought to say that the learned judge was right in what he did, and that we must dismiss this appeal with costs; but we will insert in the order a provision that it is to be without prejudice to any future application which the man may be advised to make in respect of an injury to the back.

PHILLIMORE L.J. The statute provides by s. 2, sub-s. 1, that "proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury . . . ." It follows that proceedings are maintainable if notice of the accident has been given under the conditions prescribed in this sub-section, and if a claim for compensation has been made within six months. The accident in this case happened on December 16, 1914, and on January 22, 1915, a date which is not said to be too late as not being as soon as practicable, and which is well within six months of the injury, a written notice of claim was sent by the workman's approved society to the effect that on December 16, 1914, he met with an accident. The place of the accident is described, and it is stated that the accident happened through a plank on which the workman was standing slipping while he was lifting a bag of cement, and that he sustained injuries resulting in rupture, and that he

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was totally incapacitated; and compensation was claimed on his behalf. It was decided by the House of Lords in *Powell* v. *Main Colliery Co.* (1) that a notice which merely said "Take notice that I claim" a particular figure from a particular date "until such date as I shall be able to resume work, as compensation for injuries received by me" on a date "at your colliery," was a sufficiently good notice of claim. It is not necessary in the notice of claim, therefore, to state the injuries, and this letter would have been sufficient if the words "resulting in rupture" had been omitted from it.

That being the case, the workman is not in danger, if we affirm the decision of the learned judge in the Court below, of losing or forfeiting his right to recover for injuries sustained to his back by reason of the same accident. In those circumstances, after having been paid compensation for a time, the employers reduced the compensation, or, for all I know, stopped it altogether. Thereupon on September 11, 1915, the workman made an application for compensation under the Act. That application, according to the form, has to state that on a particular date "personal injury by accident arising out of, and in the course of, his employment was caused to" the workman, and it goes on to state that "a question has arisen . . . . (*c*) as to the amount [or duration] of the compensation payable by" the employer to the workman "in respect of the said injury." Then, according to the form required, there follow particulars, one of which states the nature of the injury, and the nature of the injury in this case was stated to be rupture. This, therefore, is a claim for compensation for a particular injury arising out of a particular accident, the particular injury being rupture. Upon that the parties went to a hearing before the learned county court judge sitting as an arbitrator; and at the close of the case for the applicant it was submitted that no case had been made for compensation, although it was understood and assumed that, the accident being rupture, it would be a proper case for a suspensory award or a declaration of liability, as it always is and always should be in cases where the accident produces rupture. Thereupon the learned counsel who appeared for the applicant asked for leave to amend his particulars. Some dis-

(1) [1900] A. C. 366.

cussion ensued as to how far the injuries which his medical witnesses deposed to could be connected with the rupture, and that was finally put an end to by the medical referee saying, with the assent of the learned judge, that there was no medical connection between the injuries which were deposed to by the applicant's witnesses and the rupture; they were not sequelae or consequences of the rupture, but, if they existed, they were really independent injuries. Thereupon the application to amend was further pressed and was discussed; and after the opinion expressed by the learned judge it was ultimately withdrawn. I will come back to that in a moment.

The point of law which has been pressed upon us in this case is that the evidence as to the injury to the back was admissible upon the particulars adduced by the applicant; but this point was not taken in the county court, as was admitted by Mr. Rigby Swift in his reply. That being so, of the three grounds given in the notice of appeal two disappear—namely, "(1.) that the learned judge was wrong in law in holding that an amendment of the applicant's particulars as to the injury was necessary, and . . . . (3.) that the learned judge was wrong in law in holding that, having regard to the statement of the nature of the injury in the said particulars, he had no power to accept the medical evidence of the applicant as to injury to the applicant's back." Those points of law not having been taken in the Court below cannot be raised before us upon appeal. That is well settled by *Payne* v. *Clifton* (1) and the later case of *Harlock* v. *Owners of the Coquet* (2), which has been mentioned by the Master of the Rolls in his judgment. It is therefore unnecessary to consider whether the learned judge, if he had been asked to allow the case to go on without amendment of the particulars, would have been right or wrong. I will only say that I am not convinced that this case is distinguishable from *Sidney* v. *W. Collins, Son & Co.* (3); but the point does not come before us, and it would be unwise and improper to say anything further than that.

The appellants are left with the second ground of appeal only—namely, "that the learned judge was wrong in law in holding that he

(1) 3 B. W. C. C. 439. (2) 7 B. W. C. C. 88.
(3) 3 B. W. C. C. 433.

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had no power to amend the applicant's particulars as to the nature of the injury." If the learned county court judge had decided that, sitting as an arbitrator, he had no power of amendment, he would have been wrong; but that is not what he said. What he said, and in my opinion rightly said, was that it would be judicially wrong for him as a judge to make the particular amendment asked for in the particular case. He was sitting as an arbitrator, and an arbitrator only sits to try disputes between the parties that have been referred to him. There was no dispute between the parties, at the time of the delivery of the particulars and the making of the application, as to independent injury to the back caused by the accident, and the case was not referred to the learned judge to decide the point. Therefore the learned judge, in my opinion, was right in saying that the amendment in question was not one that he could legally or properly make. That being so, the whole case disappears. The suspensory award was not in dispute, and was properly made; the costs were in the discretion of the learned judge, and there were materials upon which he could properly exercise his discretion in the way in which he did. The one danger the workman might have been under was a danger that, if he made a future application for compensation in respect of injury to the back, he might be held to have exhausted his rights and remedies by the first application. Whether that might be so or not it is unnecessary to decide, because it is agreed and admitted by counsel for the respondents that the objection either cannot be taken or shall not be taken in this particular case; and the workman having given a good notice of claim for compensation, which is not limited as to time, will not be prejudiced if he desires to make a fresh application with regard to the injury to his back, an application which can then be properly met by the employers with the knowledge of the real point taken against them, and which can be elucidated by having the man submitted to the X-rays in order to see whether it is the fact that he really sustained a direct injury to the back by reason of the accident, or whether the man is honestly mistaken or is dishonestly asserting that he is suffering from his back when his back is not injured, or whether, as may possibly be the case, the trouble in his back is the consequence of his wearing an improper truss and stooping to avoid the pain which that truss

would otherwise have brought upon him. For these reasons I am in full agreement with the Master of the Rolls, and I think that this appeal should be dismissed with costs.

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SARGANT J. I agree with the order that is proposed to be made. There are here only two points of any general interest—first, whether the claim for injury to the back could have been dealt with while the particulars were in their present condition, and, secondly, whether there was jurisdiction to amend the particulars. As regards the first point, it was not taken in the Court below, and therefore cannot be raised here. I understand that the judgment of the Court leaves that entirely undecided ; but as Phillimore L.J. has expressed his own personal leaning towards saying that the case is not within *Sidney* v. *W. Collins, Son & Co.* (1), I should like to express my own personal preference for the view that it does come within the principle of that case.

With regard to the second point, it seems to me, when the proceedings are carefully examined, that the learned judge dealt with it mainly as a matter of discretion, and that he exercised his discretion quite rightly ; and I think also that Mr. Slater exercised his discretion as counsel wisely under the circumstances of the case. There may be one or two expressions in the learned judge's judgment which go a little further than what I have stated, but I do not think that they made any real difference. I understand that although the order of the Court will only express that it is without prejudice to any subsequent claim by the workman, still the reasons given by the Court go towards establishing affirmatively that he will be able to sustain this claim.

*Appeal dismissed.*

Solicitors for appellant : *Kingsley Wood & Co.*
Solicitors for respondents : *Ponsford & Devenish.*

(1) 3 B. W. C. C 433.

G. A. S.

C. A.

1916

*March* 31.

[IN THE COURT OF APPEAL.]

DAVIDSON, APPELLANT *v.* NEW TABERNACLE (OLD STREET CONGREGATIONAL) APPROVED SOCIETY, RESPONDENTS.

*Insurance (National Health) — Benefits under Part I. of National Insurance Act,* 1911*—Married Woman employed before Marriage—Temporary Unemployment on or after Marriage—Right to receive Benefits—National Insurance Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 44, *sub-s.* 1*—Definition contained in s.* 79.

By s. 44 of the National Insurance Act, 1911, "Where a woman who has before marriage been an insured person marries, she shall be suspended from receiving the ordinary benefits under this Part" (i.e., Part I.) "of this Act until the death of her husband . . . . Provided that, where a woman who has been employed within the meaning of this Part of this Act before marriage, proves that she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed . . . ."

By the definition contained in s. 79, "For the purposes of this Part" (Part I.) "of this Act, unless the context otherwise requires . . . . A person whose normal occupation is employment within the meaning of this Part of this Act shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed . . . ." :—

*Held,* that under s. 44, sub-s. 1, a woman, who is an "insured person," on her marriage is suspended from receiving the ordinary benefits under Part I. of the Act, and she can bring herself within the proviso only by proving that she continues to be actually employed after marriage under a contract of service; and the provision in s. 79 does not affect the position of a married woman in that respect.

Decision of Atkin J. [1915] 3 K. B. 569 reversed.

APPEAL from the decision of Atkin J. upon an award in the form of a special case stated by referees authorized under s. 67, sub-s. 3, of the National Insurance Act, 1911, by the Insurance Commissioners to decide an appeal submitted to the Commissioners; reported [1915] 3 K. B. 569.

The appeal was submitted by the appellant Ruth Davidson to the Commissioners under s. 67, sub-s. 1, of the National Insurance Act, 1911, against the decision by an arbitrator, duly appointed

in accordance with rule 37 of the rules of the society, of a dispute between her and the respondent society.

The appellant (1) became a member of the society for the purposes of the Act in 1912, being then a spinster and an insured person within the meaning of the Act.

She was in August, 1913, and had been for some years, employed in a pottery works lifting and carrying clay from outside for use in the works, an occupation which involved walking about all day. On August 5, 1913, she was married to her present husband, and on the previous day gave up her employment. She was then pregnant, the child being born on December 6 following.

On November 4, 1913, her panel doctor gave her a certificate of incapacity for work, stating the cause of incapacity as "pregnancy (œdema)," and this certificate was sent by her to the head office of the society in London, with a claim for sickness benefit. On November 6 the secretary of the society wrote as follows: "With reference to your claim upon the funds of this society, I have to inform you that your illness per se is not considered sickness under the Insurance Act for which benefit is payable. I notice that you have recently married and this being the case will you please read the enclosed form very carefully, answer the questions of same, sign your name and date, and return to me as soon as possible with your marriage certificate." The form in question was duly filled up by the appellant and sent to the society. It stated the options given to insured women who marry by s. 44 of the Act. The only part of the form material to this report is the following question which it contained, namely, "Have you ceased to be an employed person?"—to which the appellant replied by filling up the form with the words "Yes, till I am fit for work again."

On November 13, 1913, the secretary of the society wrote as follows: "With reference to your claim, I very much regret to say that it cannot be allowed as you ceased to be an insured person upon marriage and therefore became suspended from the ordinary benefits under the Act. That of which you have been informed I should like to mention again, and that is, that single persons

(1) The terms "appellant" and "respondent society" where used in this report signify the position of the parties as appearing in the special case.

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upon marriage are suspended from receiving the ordinary benefits if they are unable to prove that they remained employed persons."

On December 6, 1913, the appellant was confined and caused a letter to be written on that day to the society as follows: "Will you kindly send me a form so my doctor can fill it up? My husband is in the Post Office" (meaning that he was a deposit contributor) "and not in benefit, so I have got to claim my maternity benefit."

On December 15, 1913, the secretary of the society wrote to the appellant: "With reference to your claim, I must draw your attention to my letter to you of the 13th November last in which I stated that you were suspended from benefits as you could not furnish satisfactory proof that you remained an employed person. If your intentions are that you will resume working again directly your health returns then a statement to this effect and a stamped 6th quarter's card will be accepted as prima facie evidence that you remained an employed person." To this letter the appellant caused a reply to be sent as follows: "I wish to say that I intend to return to my employment as soon as I am able. I only left it as being unable to continue it on account of my health. As soon as I return to work I will get my card stamped. I will be obliged by your sending me the maternity benefit as soon as possible."

On December 21, 1913, the secretary of the society wrote: "In reply to your letter I very much regret having to inform you that we are not satisfied that you have not ceased to be an insured person inasmuch as you have not followed your occupation since your marriage. This event took place as far back as August 5th, 1913, and the period elapsed since then cannot be considered as of a temporary nature."

On May 16, 1914, the appellant requested that her claim should be referred to arbitration according to rule 37 of the society's rules and deposited the sum of 20*s.* in accordance with the rule. Replying to a letter from the secretary of the society the appellant stated on May 20, 1914: "I have not yet returned to work, but intend to do so as soon as I can leave the little one."

The dispute between the appellant and the society eventually

came before the arbitrator on July 31, 1914. The arbitrator gave his award dated September 18, 1914. He disallowed her appeal and directed that she should pay the society's costs, namely, the sum of 20*s*. The appellant then appealed to the Insurance Commissioners, who under the powers given them by s. 67, sub-s. 3, of the National Insurance Act, 1911, appointed two referees to decide the appeal.

The appeal was heard before the referees by way of rehearing at Sunderland on March 16, 1915.

The facts above stated were not in dispute. The appellant also proved to the satisfaction of the referees and they found as facts (*a*) that the appellant at the time of her marriage, though not then entitled to sickness benefit, was, by reason of her condition, physically incapable of continuing her then employment or any other employment that she could reasonably expect to obtain, and (*b*) that she gave up her then employment because she was physically incapable of continuing it; (*c*) that she bona fide had the intention at the time of her marriage of resuming her former or other employment so soon as she should have recovered from the effects of her expected confinement; (*d*) that she bona fide retained that intention up to the date when her claim for maternity benefit accrued, namely, on December 6, 1913, and, so far as this may be material, for a period of at least three months thereafter; (*e*) that after she had left her employment in August, 1913, her place was not kept open for her by her employers, but that she would have had no difficulty in obtaining work at the same employment had she been able to work; (*f*) that between August 5 and December 6, 1913, and for a period at least three months thereafter, she continued to be a person whose normal occupation was employment within the meaning of the Act, and that during that time she had no intention of abandoning that status for the purpose of devoting herself wholly or mainly to the care of her home and of her child; (*g*) that between November 4 and December 9, 1913, she was rendered incapable of work by some specific disease or bodily disablement within the meaning of paragraph (*c*) of sub-s. 1 of s. 8 of the Act, arising out of abnormal conditions connected with her pregnancy; (*h*) that she had fulfilled all the conditions for the receipt of sickness and maternity benefit prescribed by

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paragraphs (*b*) and (*d*) of sub-s. 8 of s. 8 of the National Insurance Act, 1911. (1)

The referees were of opinion that the appellant had proved that she continued to be employed within the meaning of the Act (1) after marriage, and that she was not suspended from receiving the ordinary benefits under the Act at the date when her claims to sickness benefit and maternity benefit respectively accrued, and they allowed her appeal and awarded that the Society do pay to her the sum of 30*s*. by way of sickness benefit and 30*s*. by way of maternity benefit.

If, however, the Court was of opinion that on the facts above stated the appellant did not continue to be employed after marriage, and was suspended from receiving ordinary benefits under the Act at the time when her claims for sickness benefit and for maternity benefit respectively accrued, then they awarded that her appeal be dismissed.

Atkin J. held upon the construction of s. 44, sub-s. 1, and s. 79 that the appellant had proved that she continued to be employed

(1) National Insurance Act, 1911, s. 44, sub-s. 1: "Where a woman who has before marriage been an insured person marries, she shall be suspended from receiving the ordinary benefits under this Part of this Act" (i.e., Part I.) "until the death of her husband, and, if she is a member of an approved society, one third of her transfer value shall be carried to a separate account called the married women's suspense account, but, if at any time after the death of her husband she becomes an employed contributor, the period between her marriage and the expiration of one month from the death of her husband shall be disregarded for the purpose of reckoning arrears . . . . Provided that, where a woman who has been employed within the meaning of this Part of this Act before marriage, proves that she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed . . . ."

Sect. 79 of the Act provides that for the purposes of Part I. of the Act, unless the context otherwise requires, "a person whose normal occupation is employment within the meaning of" Part I. of the Act "shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed, but, if such period of unemployment extends beyond twelve months, he shall not continue to be an employed contributor unless the approved society of which he is a member or, if he is not a member of such a society, the Insurance Committee, is satisfied that his unemployment is due to inability to obtain employment, and is not due to any change in his normal occupation."

after marriage when she proved that her normal occupation was employment, and he gave judgment confirming the award. The respondent society appealed.

*Comyns Carr* and *H. J. Wallington*, for the society. Sect. 44, sub-s. 1, deals with the case of a woman, who is an "insured person," marrying, and in such a case she is suspended from receiving the ordinary benefits under Part I. of the Act. "Insured persons" are defined by s. 1, sub-s. 1, as persons of the age of sixteen and upwards who are employed within the meaning of Part I. of the Act (described in sub-s. 2 as "employed contributors"), and those who are not so employed but who possess the qualifications stated in sub-s. 3 (described as "voluntary contributors"). "Employed contributors" are by sub-s. 2 those persons who are engaged in any of the employments specified in Part I. of the First Schedule (with certain exceptions not material to this case), and by clause (*a*) of Part I. the employment is to be "under any contract of service . . . . written or oral, whether expressed or implied." Therefore "employed contributor" in s. 44, sub-s. 1, refers to employment under a contract of service, and the words "employed" and "so employed" in the proviso mean employed under a contract of service. That means actually employed. To bring herself within the proviso the married woman must show continuance of the contract of service. Upon the findings here the appellant did not prove that she continued to be actually employed after her marriage. She therefore ceased to be entitled to the ordinary benefits under the Act. Sect. 79 does not qualify s. 44. It only applies to an employed contributor. The part of s. 79 which is relied upon as giving the appellant a right to the ordinary benefits under the Act is directed to the question of unemployment. It is a provision introduced "for the purpose of reckoning the number and rate of contributions" in the case of those persons whose normal occupation is employment but who are temporarily unemployed. By s. 44 a woman on marriage ceases to have a normal occupation; she is ipso facto suspended from receiving the ordinary benefits under the Act. The appellant is not deprived of her benefits under the Act, as she can claim one of the options mentioned in s. 44, sub-s. 2. The decision of Atkin J. is therefore wrong.

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*H. L. Murphy*, for the appellant. The appellant's normal occupation was employment within the meaning of s. 79, though she was temporarily out of employment through illness after her marriage. A person whose normal occupation is employment as defined by s. 1 and Part I. of the First Schedule to the Act, but who is temporarily out of employment through illness, can properly be described as employed under a contract of service. An employed contributor may be "engaged in any of the employments specified in Part I. of the First Schedule to this Act" within the meaning of s. 1, sub-s. 2, even though he may be temporarily out of employment: *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.* (1), which was reversed in the House of Lords, but the House agreed with the Court of Appeal upon the meaning of the words "bona fide engaged in discharging or receiving" goods (2); see also *In re Silver Valley Mines.* (3) The object of s. 44, sub-s. 1, is to throw the onus on a married woman, who has been employed before marriage, of proving that she "continues to be so employed after marriage," and s. 79 says that temporary unemployment is not to break the employment and to deprive the insured person of the benefits under the Act. The facts stated in the case show that the appellant's normal occupation was employment. Even apart from s. 79, the appellant was entitled to sickness and disablement benefits. She was "engaged in" an employment to which the Act applied, and the cases already cited show that temporary unemployment does not prevent a person being "so employed." The Legislature did not intend to place a person temporarily unemployed outside the provisions of the Act and to compel him to requalify for sickness benefit under s. 8, sub-s. 8, by paying twenty-six weekly contributions.

*Comyns Carr* in reply.

SWINFEN EADY L.J. This is an appeal by the society from the judgment of Atkin J. upon an award in the form of a special case stated by referees under the National Insurance Act, 1911. The appellant, who had for some years before August 4, 1913, been employed under a contract of service within the meaning of Part I.

(1) [1908] 1 K. B. 786. (2) [1909] A. C. 15, 18.
(3) (1881) 18 Ch. D. 472.

of the First Schedule to the Act, on that day gave up her employment for the purpose of being married on August 5, and at all material times since August 4 she has not been actually employed under a contract of service within the meaning of Part I. of the schedule. The referees have found certain facts by which we are bound. [The Lord Justice read paragraphs (*b*), (*c*), and (*e*) in the special case.] Upon these findings the question is whether the appellant can claim the ordinary benefits under the Act. By s. 1, sub-s. 1, "All persons of the age of sixteen and upwards who are employed within the meaning of this Part of this Act shall be, and any such persons who are not so employed but who possess the qualifications hereinafter mentioned may be, insured in manner provided in this Part of this Act, and all persons so insured (in this Act called 'insured persons') shall be entitled to" benefits in respect of health insurance and prevention of sickness. By sub-s. 2, "The persons employed within the meaning of this Part of this Act (in this Act referred to as 'employed contributors') shall include all persons of either sex, whether British subjects or not, who are engaged in any of the employments specified in Part I. of the First Schedule to this Act, not being employments specified in Part II. of that schedule . . . ." Down to August 4 the appellant was an employed contributor and therefore an insured person within s. 1. How did her marriage affect her position under the Act? By s. 44, sub-s. 1, she became prima facie "suspended from receiving the ordinary benefits under" the Act. The proviso, however, says that, where a woman who has been employed within the meaning of Part I. of the Act before marriage proves that "she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed." It is contended that the appellant has brought herself within that proviso, and that, though prima facie on her marriage she was suspended from receiving benefits, her position as an employed contributor has, upon the facts stated in the special case, been preserved to her after her marriage. In my opinion that contention is not correct. The appellant did not continue to be actually employed after her marriage. Therefore she did not continue to be "so employed" after marriage within the meaning of the section. The proviso requires proof that she continues to be, not an employed contributor,

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Swinfen Eady L.J.

but "so employed after marriage." That seems to me to mean so employed under a contract of service. It is said that s. 79 assists her. The provision relied upon in that section applies to persons who are not in actual employment, that is to say, to persons who are temporarily out of employment, but whose normal state is employment under Part I. of the Act; and with regard to those persons the proviso says that for certain purposes, namely, "for the purpose of reckoning the number and rate of contributions," they are to be deemed to continue to be employed contributors. Though they are temporarily unemployed and in consequence there are no employers to pay the proper share of the weekly contributions, yet for those purposes they are to be deemed to be employed contributors, and the contributions are to be reckoned on the scale applicable to such a case.

I fail to see how that provision assists the appellant. It seems to me that the language of the proviso in s. 44 is not affected by s. 79. The position of a woman who marries is that she is suspended from receiving the ordinary benefits under the Act, but where she was employed before marriage and proves that she has continued to be "so employed after marriage"—not an employed contributor—she shall not be suspended so long as she continues to be so employed. The appellant was never employed under any contract of service after her marriage. Upon the language of the Act she has not brought herself within the proviso in s. 44, sub-s. 1, and she is and was at all material times suspended from receiving the ordinary benefits under Part I. of the Act. With some regret I have come to the conclusion that the appeal succeeds.

PICKFORD L.J. I agree, though I do so with some regret. Having regard to the findings of fact contained in paragraphs (*b*), (*c*), (*d*), and (*e*) of the special case, does the appellant come within the proviso in s. 44? "Employed" means what it says. It does not mean having the status of a person employed. The appellant after her marriage did not continue to be employed. She no doubt was willing and intended to go back to employment as soon as she was well again, but she was under no contract of service; and if the matter stood there it is clear that she did not prove that she "continued to be so employed after marriage." But it is said—

and this is the ground upon which Atkin J. decided the case—that s. 79 brings the appellant within s. 44, sub-s. 1. That section enacts that a person whose normal occupation is employment shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed. The proviso in s. 44, sub-s. 1, requires the married woman to prove that she "continues to be so employed." That requirement is not satisfied by proof that she is to be deemed to continue to be an employed contributor. They are two different things. Atkin J. puts his judgment on this ground (1): "But in all the circumstances of the case, though the appellant as a married woman no doubt had to prove that she continued to be employed after marriage, I think that she has proved that she continued to be employed after marriage, when she proved that her normal occupation was employment within the meaning of the Act." There I differ from him. The appellant did not, on proving that, prove that she continued to be employed within the meaning of the proviso to sub-s. 1 of s. 44. She had to prove actual employment. The express provision in s. 44, sub-s. 1, dealing with the position of an insured woman marrying is not in any way displaced by s. 79.

BANKES L.J. I agree. The point raises a difficulty on the construction of the Act, but on the whole I am unable to agree with the judgment of Atkin J. Sect. 1 of the Act contains the definition of insured persons. By sub-ss. 2 and 3, "insured persons" consist of "employed contributors" and "voluntary contributors"; and "employed contributors" (sub-s. 2) include all persons who are engaged in any of certain employments specified in Part I. of the First Schedule.

It is correct to say that a person who is so employed becomes and remains an insured person, though temporarily out of employment. But it is said on behalf of the appellant that under clause (*a*) of Part I. of the schedule an employed contributor need not necessarily be employed under a contract of service, but that it is sufficient if he has the status of a servant. I cannot agree. I read this clause as meaning that a person, to be an employed contributor, must be

(1) [1915] 3 K. B. 579.

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Bankes L.J.

actually engaged under a contract of service. That is borne out by the provisions of s. 4, which deals with the rates of contributions, indicating that an employed contributor must have an employer. It was with respect to that state of matters that the provision in s. 79 was enacted. It deals with the case of an employed contributor who ceases to be employed, and therefore has no employer. The enactment is divided into two parts. It deals, first, with the position of such a person who becomes temporarily unemployed; and, in the second place, with his position when the period of unemployment extends beyond twelve months. Sect. 44 deals with a special class of insured persons, namely, women who marry. Such a woman is by the first part of sub-s. 1 placed in a class by herself. She is put into a suspended class. She loses the status of an insured person and takes the status of her husband, and this is shown by her receiving the maternity benefit through him. She does not, however, necessarily cease to be insured on her marriage if she can bring herself within the proviso. Sect. 79 does not interfere with the position of a married woman in that respect. It is not intended to apply to the case of a woman who on her marriage is suspended from receiving the ordinary benefits under the Act; it is intended to apply to the case of a person whose normal occupation is employment, but who is temporarily out of employment. A married woman, who by s. 44 is suspended from receiving ordinary benefits, can elect to take one of the options given to her by sub-s. 2. Under the proviso to sub-s. 1 she can take herself out of the suspended class if she can prove that she "continues to be so employed after marriage." That means continues to be employed under a contract of service after marriage. Upon the facts stated in the special case it is impossible to say that the appellant has discharged that onus. She not only was unemployed, but she had no employer. However willing she was to go back to work, it is impossible to contend that after marriage she was employed as before her marriage. The appeal therefore must be allowed.

*Appeal allowed.*

Solicitors for appellant: *Withers, Bensons, Birkett & Davies.*
Solicitors for society: *Kingsley Wood & Co.*

W. F. B.

[IN THE COURT OF APPEAL.]

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*March* 7, 8, 9;
*April* 11.

## WEDD *v.* PORTER AND OTHERS.

[1914 W. 918.]

*Landlord and Tenant—Lessee holding over after Expiration of Term—Tenancy from Year to Year—Terms implied by Law in Absence of Agreement—Assignee of Reversion—Right to sue for Breaches of Covenant contained in Lease—Breaches of implied Obligations.*

It is a question of fact in each case whether a tenant holding over on the expiration of the term granted by a lease does so upon the terms of the expired lease. If the true inference of fact is that the tenant holds over as tenant from year to year on the terms of an expired lease so far as those terms are applicable to such a tenancy, in law there is constituted a new agreement to that effect between the parties. Where a tenant holds over on the expiration of a term, and the facts do not exclude an implied agreement to hold upon the terms of the old lease, the law determines that he impliedly holds subject to all the covenants in the lease which are applicable to the new tenancy.

A tenant from year to year of a farm and buildings at a rent, who has not entered into any other express agreement with his landlord than as to the amount of the rent, is under an obligation implied by law to use and cultivate the land in a husbandlike manner, according to the custom of the country (subject to the provisions of the Agricultural Holdings Act, 1908), and to keep the buildings wind and water tight; and the assignee of the reversion can at common law enforce this implied obligation against the tenant.

Where, therefore, a tenant of a farm and buildings under a lease containing express covenants by him continued in occupation after the expiration of the term, the landlord and tenant agreeing that the terms of the old lease should not apply, but not agreeing upon the terms of the new tenancy except that there should be a yearly tenancy at a fixed rent, and the landlord assigned the reversion during the continuance of the tenancy, the assignee of the reversion was held entitled to sue the tenant for breaches of the above-mentioned implied obligations which occurred after the assignment of the reversion.

APPEAL from the judgment of a Divisional Court (Ridley and Shearman JJ.) reversing an order of an official referee.

By an indenture of lease dated October 11, 1878, one William Butt demised to Isabella Porter, Frederick Charles Porter, and Albert Porter a mansion-house and lands known as Corney Bury,

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and three farms with the farm buildings thereon, for the term of fourteen years from September 29, 1878, at the yearly rent of 1301*l.* 7*s.* for the first seven years and of 1330*l.* 19*s.* 3*d.* for the remainder of the term. By the lease the lessees covenanted that they would from time to time paint, paper, whitewash, repair, maintain, amend, and keep the farmhouses, offices, and other buildings (with certain exceptions not material to this report), and the fixtures therein, and all the walls, gates, stiles, hedges, bridges, fences, culverts, drains, and ditches in repair, and would deliver up the same so painted, &c., at the expiration of the term; and further that they would paint and tar in every fifth year of the term such parts of the wood and iron work of the exterior of the buildings as had theretofore been painted or tarred, and would paint, paper, and whitewash in the seventh and last year of the term such parts of the inside of the buildings as were then painted, papered, and whitewashed; and also that they would keep and maintain the lands and grounds in good heart and condition and well farmed and well weeded, and would cultivate and manage the same in a husbandlike manner and according to the most improved system of husbandry in that part of the country where the demised premises were situated.

Isabella Porter died during the term and the two other lessees continued in occupation as sole tenants. The lease expired by effluxion of time on September 29, 1892, and the two lessees remained in occupation after the expiration of the term. Negotiations ensued for a new tenancy on new terms, but no agreement was arrived at, the result being, as Swinfen Eady L.J. said in his judgment, "the parties agreed that the terms of the old lease should not apply, and never agreed upon the terms of any new arrangement, except that there should be a yearly tenancy at 850*l.* a year, and this rent continued to be paid less voluntary abatements from time to time made by Mr. Butt."

F. C. Porter died on November 21, 1911, and his executors continued in occupation with Albert Porter. Butt, the landlord, died on December 3, 1911, and his executors on September 17, 1912, gave notice to the tenants to determine the tenancy on September 29, 1913. Butt's executors by deed dated December 3, 1912, conveyed part of the lands and premises comprised in the lease of

1878 to the plaintiff in fee simple, and by a deed dated September 18, 1913, they conveyed the remainder of the lands and premises to him in fee simple. On September 19, 1913, the tenants made a claim against the plaintiff as landlord for compensation under the Agricultural Holdings Act, 1908.

The plaintiff brought this action against the tenants, claiming damages for breach of the covenants, terms, and conditions of the lease of 1878, so far as the same were applicable to the tenancy after the expiration of the lease, contending that the defendants remained in occupation as tenants from year to year upon those covenants, terms, and conditions. Alternatively they claimed damages on the footing that on the expiration of the lease the defendants became tenants from year to year subject to the obligations implied by law that the tenants should use the buildings and premises in a tenantable and proper manner and keep the same wind and water tight, and should maintain throughout the tenancy and leave at the determination thereof all such buildings and premises in sound and tenantable repair and proper order and condition; and should cultivate the lands in a good and husband-like manner according to the custom of the country, and should cleanse the ditches and preserve and repair the gates, hedges, and fences, and should not make or permit any waste on the lands or premises.

The action was sent for trial before an official referee. It was agreed that the official referee should determine the question of liability first before going into any question of the amount of damages. The official referee came to the conclusion that "neither Mr. Butt nor the Porters were satisfied to go on upon the holding over under the lease of 1878," and negotiations ensued for a new agreement; but as no agreement was arrived at, the presumption was that the tenants held over as tenants from year to year on the terms of the expired lease so far as they were applicable to such a tenancy. He came, therefore, to the conclusion that the defendants were tenants from year to year holding over on the terms of the lease so far as they were applicable to such a tenancy; and that the defendants by their notice under the Agricultural Holdings Act, 1908, had recognized the plaintiff as their landlord. He accordingly made an order whereby it was declared that after the

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expiration of the lease granted by the indenture of October 11, 1878, the defendants or their predecessors in title held over from September 29, 1892, until September 29, 1913, as tenants from year to year of the farms and premises upon the covenants, terms, and conditions of the lease in so far as they were applicable to a tenancy from year to year; and further declared that the plaintiff was entitled to recover from the defendants damages for breaches of the covenants, terms, and conditions of the lease on the basis of such tenancy from year to year, and in particular that the plaintiff was entitled to recover from the defendants damages in respect of breaches of covenants, terms, and conditions dependent upon periodic occasions and happenings in so far as such periodic occasions and happenings had taken place during the continuance of the tenancy from year to year.

The Divisional Court entered judgment for the defendants. They held that, as there was no lease under seal, 32 Hen. 8, c. 34, did not apply, and the plaintiff as assignee of the reversion could not sue for breach of the covenants; and further that the official referee was wrong in holding that the defendants continued in occupation upon the terms of the expired lease so far as they were applicable. The plaintiff appealed.

*Rawlinson, K.C.*, and *W. H. Aggs*, for the plaintiff. It is a question of fact whether on the expiration of the original term in 1892 the tenants held over as tenants from year to year on the terms of the old lease so far as they were applicable. Upon the facts here the tenants did so hold over and the official referee has so found. The implication of law is that a tenant remaining in possession after the expiration of a lease does so as tenant from year to year on the terms of the old lease, so far as those terms are consistent with such a tenancy, in the absence of any evidence to rebut that implication: *Dougal* v. *McCarthy*. (1) The presumption arises from the fact that the tenants continue in possession and pay rent. The presumption arose here upon the tenants holding over in 1892, and the tenancy continued until determined by notice to quit or by agreement between the parties. No subsequent agreement was arrived at to alter that presumption. The plaintiff as

(1) [1893] 1 Q. B. 736.

assignee of the reversion can sue for breach of the tenants' obligations. There being no lease under seal, the Act 32 Hen. 8, c. 34, does not give the plaintiff, as assignee of the reversion, the right to sue. But on the facts here there was a new contract between the plaintiff and the defendants recognizing and adopting the obligations of the lessees under the expired lease: *Smith* v. *Eggington* (1); *Manchester Brewery Co.* v. *Coombs.* (2) The defendants paid rent to the plaintiff, and in the claim by the defendants for compensation under the Agricultural Holdings Act, 1908, the defendants recognized the plaintiff as their landlord. The plaintiff was described in the notice of claim as the landlord and the defendants as the tenants, "tenant" being defined in s. 48 as "the holder of land under a contract of tenancy" and "contract of tenancy" as including a letting from year to year. The defendants by the service of that notice are estopped from alleging that the plaintiff is not their landlord. When Butt's executors conveyed the lands to the plaintiff there passed to him a right of action for breaches of the covenants, many of them being continuing breaches, in respect of which the plaintiff is entitled to sue. Moreover, s. 10 of the Conveyancing Act, 1881, enables the plaintiff to sue. The section was intended to extend the provisions of 32 Hen. 8, c. 34. It provides that "rent reserved by a lease and the benefit of every covenant . . . . on the lessee's part to be observed or performed . . . . shall be annexed and incident to and shall go with the reversionary estate in the land." "Lease" does not mean lease under seal; it includes a lease by parol: *Bridgland* v. *Shapter* (3); *In re Negus* (4); *Rickett* v. *Green.* (5) If a tenant holds under an agreement for a lease of which the Court will grant specific performance he holds under a lease in the terms of the agreement: *Martin* v. *Smith* (6); *Manchester Brewery Co.* v. *Coombs.* (7) [Sect. 25, sub-s. 6, of the Judicature Act, 1873, and *Torkington* v. *Magee* (8) were also referred to.]

*Disturnal, K.C.*, and *W. Allen*, for the defendants. There being no lease under seal, the statute 32 Hen. 8, c. 34, does not apply, and the plaintiff as assignee of the reversion cannot sue the defendants

(1) (1874) L. R. 9 C. P. 145.
(2) [1901] 2 Ch. 608, 615.
(3) (1839) 5 M. & W. 375.
(4) [1895] 1 Ch. 73, 78.
(5) [1910] 1 K. B. 253, 259.
(6) (1874) L. R. 9 Ex. 50.
(7) [1901] 2 Ch. 608.
(8) [1902] 2 K. B. 427.

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for breaches of the covenants in the expired lease, even assuming that the defendants became tenants from year to year subject to the covenants of the expired lease so far as they were applicable to such a tenancy. Express covenants to repair do not run with the reversion at common law. Nor is the plaintiff's position assisted by s. 10 of the Conveyancing Act, 1881. That section only applies to a lease in writing for a term; there must be an instrument in writing, and a tenancy such as this is from year to year does not come within the section. Where it is intended to include a lease not in writing the Legislature expressly says so, as in s. 18, sub-s. 17. This seems to be the view taken by Farwell J. in *Manchester Brewery Co.* v. *Coombs.* (1) But in fact the defendants did not hold over on the terms of the expired lease. Neither the landlord nor the tenants intended when the lease expired in 1892 that the latter should hold over as tenants from year to year on those terms. Negotiations took place as to the terms of the new tenancy, but no agreement was arrived at, except that the tenants should have a yearly tenancy at the rent of 850*l.* a year. The parties were negotiating upon the basis that the terms of the expired lease should not apply. It is a question of fact in each case as to the terms upon which a tenant holds over: *Hyatt* v. *Griffiths.* (2) The plaintiff must show a new contract between himself and the defendants under which they became tenants to him on the terms of the expired lease so far as those terms are applicable to the new tenancy: *Buckworth* v. *Simpson* (3); *Cornish* v. *Stubbs* (4); *Manchester Brewery Co.* v. *Coombs.* (5) The facts do not support any such case. The plaintiff therefore cannot sue the defendants for breaches of the obligations to repair contained in the expired lease. Nor can he sue for breaches of the covenants implied by law. Whatever may be the obligations to repair they do not pass to the assignee of the reversion. If, however, the defendants are liable to be sued for breaches of the covenants implied by law, they are only liable to pay the rent, to farm in a husbandlike manner according to the custom of the country, and not to commit waste, and they are only liable to the plaintiff for breaches occurring after the dates of the assignments to him. In

(1) [1901] 2 Ch. 619.
(2) (1851) 17 Q. B. 505.
(3) (1835) 1 C. M. & R. 834.
(4) (1870) L. R. 5 C. P. 334, 338, 339.
(5) [1901] 2 Ch. 615.

any view of the case, therefore, the defendants can only be liable to the plaintiff for breaches occurring after the dates of those assignments: *Martyn* v. *Williams*. (1) The real claim against the defendants at the trial was not based upon liability in respect of implied covenants, but upon liability in respect of the covenants contained in the expired lease.

*Rawlinson, K.C.*, in reply. The plaintiff in his statement of claim alleged, as an alternative, liability under the custom of the country. The assignee of the reversion can sue the tenant upon covenants implied by law, as they run with the reversion like the liability to pay the rent.

*Cur. adv. vult.*

April 11. SWINFEN EADY L.J. read the following judgment:— The plaintiff in this action claimed damages for the breach of an agreement of tenancy of certain farms, buildings, lands, and premises. The action was tried before an official referee, who made an order on April 27, 1915. [The Lord Justice read the order set out above.] Upon motion by the defendants to a Divisional Court the order of the official referee was discharged, and it was ordered that judgment be entered for the defendants. The plaintiff now appeals from this order of the Divisional Court.

The plaintiff recently purchased the farms and premises in question from the representatives of the late William Butt, of Corney Bury in the county of Hertford. Part of the premises was conveyed to the plaintiff by deed dated December 3, 1912, and the remainder by deed dated September 18, 1913, and the defendants' yearly tenancy, whatever the conditions of it were, expired on September 29, 1913, pursuant to a notice to quit given twelve months previously.

The first question to be determined is, What were the terms and conditions of the tenancy from year to year upon which the defendants held the premises at the date of the plaintiff's purchase? The defendants and their predecessors had been in occupation of the farms and premises under Mr. Butt for many years. Mr. Butt had been an indulgent landlord, and extended liberal treatment to his old tenants. By a lease dated October 11, 1878, William Butt demised to Isabella Porter, widow, Frederick Charles Porter, and the

(1) (1857) 1 H. & N. 817.

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defendant Albert Porter, Corney Bury mansion-house and lands, Corney Bury Farm, Throcking Farm, Bridgefort Farm, and certain maltings at Buntingford from September 29, 1878, for the term of fourteen years, at the rent of 1301*l.* 7*s.* during the first seven years and 1330*l.* 19*s.* 3*d.* during the rest of the term. This lease expired at Michaelmas, 1892. No further document has been signed by the parties putting into writing the terms of the tenancy subsequent to the expiration of this lease. Mrs. Isabella Porter died on March 26, 1889. After her death Frederick Charles Porter and Albert Porter continued as tenants of the farms. Frederick Charles Porter died on November 21, 1911, and the defendants Eliza Porter and George Joseph Bayspool Porter are his executrix and executor.

Although the rent reserved by the lease during the last seven years of the term was 1330*l.* 19*s.* 3*d.* per annum, I gather, although the evidence is not very clear, that no such amount had been paid during the latter years of the term. After the expiration of the term the correspondence makes it clear that the tenants did not intend holding over upon the terms of the expired lease, nor did the landlord intend that they should. They agreed that the tenancy should not be on the old terms of the expired lease. There were discussions as to the terms of a new tenancy. Mr. F. C. Porter even suggested to Mr. Butt's solicitor that perhaps it would be better for him to give up the whole of Corney Bury. He stated that he considered that the full annual value at that time did not exceed 650*l.*, and that he could not possibly find money enough to pay more than 800*l.* There were also negotiations with regard to repairs, mode of cultivation, the shooting rights, and other matters. It is a question of fact in every case whether tenants holding over do so upon the terms of an expired lease : *Hyatt* v. *Griffiths.* (1) If the true inference of fact to be drawn is that the tenants do hold over upon the terms of an expired lease, so far as applicable to an annual tenancy, in law there is constituted a new agreement to that effect between the parties : *Oakley* v. *Monck.* (2) Where tenants hold over after the expiration of a term, and the facts do not exclude an implied agreement to hold upon the terms of the old lease, then the law determines that they impliedly hold subject to all the covenants in the lease which are applicable to the new

(1) 17 Q. B. 505. (2) (1866) L. R. 1 Ex. 159.

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situation : *Digby* v. *Atkinson*. (1) The official referee stated in his judgment that it appeared fairly obvious that neither Mr. Butt nor the Porters were satisfied to go on upon the holding over under the lease of 1878, and in my judgment this was correct, and after the end of the lease neither party expressly or impliedly agreed to continue upon any of the terms contained in it.

The negotiations for a new agreement proceeded a considerable way. Some of the new terms for the proposed new tenancy were provisionally arranged, and counsel received written instructions to settle a new tenancy agreement from year to year, with proper covenants and conditions as to the proper keeping up of the farm in accordance with the custom of the country. Accordingly a draft agreement was prepared, and was under consideration in the summer of 1894. Mr. F. C. Porter saw Mr. Butt's solicitor upon the draft, and marginal notes in the draft indicate the points under discussion upon which they were not agreed. In August, 1894, Mr. Booty, the solicitor, again sent the draft to Mr. Porter in order that he might go through it again with his brother, and suggested a compromise with regard to two of the points in dispute, namely, that the landlord should give way on the question of taking two white crops in succession off 120 acres, and that the tenants should give way on the question of the restriction upon mowing the grass lands. It does not appear that this proposal was accepted by the tenants, or that the other outstanding questions were adjusted. No agreement was ever signed between the parties, nor was any draft agreement assented to.

The result is that the parties agreed that the terms of the old lease should not apply, and never agreed upon the terms of any new arrangement, except that there should be a yearly tenancy at 850*l.* a year, and this rent continued to be paid less voluntary abatements from time to time made by Mr. Butt.

In my opinion the official referee arrived at the right conclusion in determining that no agreement upon the terms of counsel's draft was ever arrived at. He, however, appears to have thought that, unless it was shown that this new express agreement had been come to, he was bound to hold that the terms of the old lease remained in force. This view is erroneous ; the parties were agreed that the old terms were inapplicable. What actually happened was that the parties

(1) (1815) 4 Camp. 275.

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agreed upon a yearly tenancy at 850*l.* rent, and, in default of having made any other agreement, the additional implied terms are those which the law implies on such a tenancy.

Having now stated what in my judgment were the terms upon which the tenancy subsisted between the parties, it remains to consider whether the plaintiff can lawfully maintain this action against the defendants upon any of the grounds alleged in the pleadings and not yet disposed of. A tenant from year to year of a farm and buildings at a fixed rent, who has not entered into any other express agreement with the landlord than as to the amount of rent, is under an obligation implied by law to use and cultivate the lands in a husbandlike manner, according to the custom of the country: *Horsefall* v. *Mather* (1); *Powley* v. *Walker* (2); *Onslow* v. *Anon.* (3), (subject to the provisions of the Agricultural Holdings Act, 1908), and to keep the buildings wind and water tight: *Auworth* v. *Johnson* (4); *Leach* v. *Thomas* (5); but is not liable to "sustain and uphold the premises": *Auworth* v. *Johnson.* (4)

It is, however, objected that the plaintiff, as the assignee of the reversion, cannot enforce this liability against the defendants. It is said there is no lease by deed containing express covenants, and therefore the Act 32 Hen. 8, c. 34, does not assist the plaintiff: *Standen* v. *Chrismas* (6); *Bickford* v. *Parson.* (7) The plaintiff meets this objection by relying upon s. 10 of the Conveyancing Act, 1881, and urges that now a writing not under seal will be sufficient. But this question does not really arise, as there is no writing, and no case for specific performance, and nothing to show that any instrument at all was ever intended to be executed or signed by the parties: see *Clayton* v. *Illingworth* (8); *Manchester Brewery Co.* v. *Coombs.* (9)

The law, however, has always drawn a distinction between express and implied covenants and conditions. By the rules of the common law none but parties or privies to express covenants were bound by or could take advantage of them, and grantees of reversions were regarded in the light of strangers. If the grantee of a reversion

(1) (1815) Holt, N. P. 7.
(2) (1793) 5 T. R. 373.
(3) (1809) 16 Ves. 173.
(4) (1832) 5 C. & P. 239.
(5) (1835) 7 C. & P. 327.
(6) (1847) 10 Q. B. 135.
(7) (1848) 5 C. B. 920, 929, 932.
(8) (1853) 10 Hare, 451.
(9) [1901] 2 Ch. 616.

could have maintained an action of covenant against the lessee upon his express covenant, the provision of the statute 32 Hen. 8, c. 34, would have been in a great degree unnecessary. But the statute refers only to express covenants, and not to covenants in law or implied covenants. The statute provides that grantees of reversions "shall and may have and enjoy all and every such like and the same advantage, benefit, and remedies by action only, for not performing of other conditions, covenants, or agreements contained and expressed in the indentures of their said leases." The reason why the statute extended only to express covenants was that no such provision was necessary with regard to covenants in law or implied covenants. The law is thus stated in Platt on Covenants, (1829) p. 532: "Upon an implied covenant, however, an action at the suit of the assignee of the reversion was undoubtedly maintainable prior to the passing of that Act." And so with conditions. In Sheppard's Touchstone, 8th ed., p. 140, note (*y*), it is thus stated: "It is a rule of the common law that no one can take advantage of the breach of an express condition but parties and privies in right and representation; as heirs, executors, or administrators of natural persons, and the successors of bodies politic; so that neither privies nor assignees in law, as lords by escheat, nor privies in estate, as persons in remainder, can enter for a condition broken. In the case however of conditions implied or in law, privies and assignees in law may enter for breach of them. Thus Lord Coke says, if a man makes a lease for life, there is a condition in law annexed to it, that if the lessee creates a greater estate than for his own life the lessor may enter. Of this, and the like conditions in law, not only the lessor and his heirs may take the benefit, but also his assignee, as the lord by escheat." The reference to Lord Coke is to the first Institute (Co. Litt.), 215a, where that learned author treats of the "diversitie" or difference which existed at common law, and before the statute of Henry VIII., between conditions expressed in deeds and conditions in law or implied conditions.

The plaintiff is therefore entitled to maintain a claim against the defendants for such breaches (if any) of the implied obligations as have occurred since the conveyances to the plaintiff, that is to say, as to part of the property between December 3, 1912, and September 29, 1913, and as to the rest of the property between September 18,

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1913, and September 29, 1913, when the tenancy expired. For any breaches which occurred before the conveyances the plaintiff cannot sue, as causes of action which had accrued to the vendors did not pass to the plaintiff by those deeds: *Lewes* v. *Ridge* (1); *Canham* v. *Rust* (2); *Johnson* v. *Churchwardens of St. Peter, Hereford.* (3)

The result to the parties is the same whether the benefit of the implied obligation passes to the plaintiff as assignee of the reversion, or whether he becomes entitled to it by virtue of the relationship of landlord and tenant constituted by the conveyances. Since the statute 4 & 5 Anne, c. 16, s. 9, attornment is no longer necessary, and upon conveyance the defendants became tenants to the plaintiff for the unexpired portion of the yearly tenancy, and were under the same implied obligations to the plaintiff as before conveyance they were under to his predecessor in title. These obligations spring, in the absence of any agreement to the contrary, from the mere relationship of landlord and tenant. By force of the statute of Anne there was the same privity between the plaintiff and the defendants, after the dates of the respective conveyances, as if the defendants had actually attorned tenants to the plaintiff: *Williams* v. *Hayward.* (4)

The plaintiff has in his statement of claim duly claimed relief against the defendants upon this footing, and this claim has not yet been dealt with or adjudicated upon by the official referee, and the matter must go back to him to be disposed of.

The proper order will be to allow the appeal and discharge the order of the Divisional Court, except so far as it discharged the order of the official referee; declare that the defendants are liable in damages to the plaintiff for the breaches (if any) after the dates of the respective conveyances to the plaintiff of the implied obligations to keep the buildings wind and water tight, and to use and cultivate the lands in a husbandlike manner according to the custom of the country, subject to the provisions of the Agricultural Holdings Act, 1908. Each party has partly succeeded and partly failed, and the proper order as to costs will be for each side to bear his own costs in the Divisional Court and of this appeal. The costs of the former hearing before the official referee and of any further hearing pursuant to this order to be dealt with by the official referee.

(1) (1601) Cro. Eliz. 863.
(2) (1818) 8 Taunt. 227.
(3) (1836) 4 Ad. & E. 520.
(4) (1859) 1 E. & E. 1040, 1050.

PICKFORD L.J. read the following judgment:—I have had the advantage of reading the judgments of Swinfen Eady and Bankes L.JJ. in this case, and agree with them, and therefore I do not think it necessary to say more than a few words.

I agree that on the evidence there was no tenancy from year to year on the terms of the old lease established, and that what took place was that the parties agreed that the tenancy should not be upon the old terms, but never arrived at a concluded agreement as to what the terms should be. The result is that the tenants continued to hold upon the terms of an ordinary tenancy from year to year, i.e., that they should cultivate the lands in a husbandlike manner according to the custom of the country, subject to the provisions of the Agricultural Holdings Act, 1908, and keep the buildings wind and water tight. These are the terms upon which the plaintiff thought that the tenants were holding, as is seen by his claim as originally framed, and the idea of a tenancy upon the terms of the original lease only arose on the lease coming to his knowledge in the course of the proceedings.

The question then to be determined is whether the plaintiff is entitled to sue the defendants for a breach of those covenants implied by law. I think he is, because the defendants became his tenants by reason of the conveyance to the plaintiff of the lands occupied by them, and the terms of such tenancy were those implied by law in an ordinary yearly tenancy, no attornment being necessary since 4 & 5 Anne, c. 16, s. 9.

It is not therefore necessary to decide the points raised upon s. 10 of the Conveyancing Act, 1881, and the right of an assignee of the reversion to sue upon covenants implied by law, but I agree with what has been said on the latter point.

I think the judgment of the Divisional Court was wrong in so far as it entered judgment for the defendants, and that the case should go back to the official referee to assess the damages on the basis stated in the judgment of Swinfen Eady L.J.

BANKES L.J. read the following judgment:—This is an appeal from an order of the Divisional Court reversing a decision of Mr. Pollock, the official referee. The appeal raises two questions: first, as to the terms on which the defendants held the farms purchased by

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the plaintiff; secondly, whether the plaintiff as purchaser of the reversion expectant upon the determination of the defendants' tenancy has any, and if so what, right of action against the defendants.

On the first point the Divisional Court took a different view from that taken by the official referee. The difficulty of the case is created by the fact that all the persons who knew what really happened are dead, and as a result an inference has to be drawn from what those persons did or wrote or omitted to do or write. The story commences in the year 1878, when the late Mr. Butt demised certain farms and premises to Isabella Porter, Frederick Charles Porter, and the defendant Albert Porter for a term of fourteen years from September 29, 1878, at a rent of 1301*l.* for the first seven years and afterwards of 1330*l.* The lease contained covenants to repair, paint, scour, cleanse, and amend the farmhouses and buildings and the walls, gates, stiles, &c., to the terms of which it is not necessary particularly to refer. This lease expired on September 29, 1892. By that date Isabella Porter had died, and the two brothers continued in occupation of the demised premises. In the years 1893 and 1894 negotiations were in progress for a fresh tenancy. On the brothers' part the negotiations appear to have been conducted by Frederick Charles Porter, who died in 1911; the defendant Albert Porter told the official referee that he took no part in the negotiations and only knew of what happened from what his brother told him. [The Lord Justice dealt with the negotiations, stating that no agreement was ever signed, either because the parties failed to agree or never troubled to come to any agreement, and the tenants continued in occupation until September 29, 1913, paying the reduced rent of 850*l.* a year subject to voluntary abatements given by the landlord.]

Upon what terms must the tenants be considered to have continued in possession after the year 1894? The official referee held that as the tenants held over after the expiration of the lease, and as the alleged agreement of 1893 had not been established, the inference of law was that they held over as tenants from year to year upon the terms of the lease so far as they were applicable. The Divisional Court did not agree with this view. In my opinion the Divisional Court were right. It is, I think, impossible to regard the negotiations of 1894 as absolutely without result. It is true

that they did not result in complete agreement on all points, but it is, in my opinion, quite clear that they did result in complete agreement on one point, namely; that if the tenants continued in occupation it was to be as from Michaelmas, 1893, on terms different from those in the lease, and that the terms of the lease were no longer to apply to the tenancy. Under these circumstances, as the parties failed to agree upon any terms except the rent and the fact that the tenancy was to be a yearly one commencing at Michaelmas, 1893, the true inference, in my opinion, is that in all other respects the tenancy was one upon the terms implied by law as applicable to an agricultural tenancy of land and buildings, namely, that the tenant must keep the buildings wind and water tight and cultivate the land in a husbandlike manner according to the custom of the country. The official referee appears to have attached importance to the fact that the course of dealing between the landlord and the tenants with regard to repairs appeared to him to have been the same, or much the same, after the year 1894 as it had been during the currency of the lease. This ceases to be of any importance when once the conclusion is arrived at that the parties did definitely agree not to continue the old relations ; but in any event I do not regard the dealings of the parties in relation to repairs of any real importance, having regard to the indefinite position in which the tenants stood and to the extremely indulgent way in which the landlord appears to have treated them and the allowances he made them, in consideration of which the tenants may well have done small repairs which they were under no legal obligation to do.

The conclusion at which I have arrived coincides with the view of the position originally taken by the plaintiff's advisers when the action was commenced. At that time the plaintiff's case was based upon alleged breaches of covenants implied by law, and it was only after the expired lease was discovered in the possession of the vendor's representatives that the plaintiff alleged the existence of a yearly tenancy upon the terms of the lease as regards repairs. The plaintiff's claim to recover damages was rested in the statement of claim upon the relationship of landlord and tenant which was established between the plaintiff and the defendants upon and after the conveyances by the executors of the late Mr. Butt to the plaintiff of December 3, 1912, and September 18, 1913. This

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is, in my opinion, a true ground upon which the claim can be based, but it entitles the plaintiff to relief only in respect of breaches of covenant committed after the relationship of landlord and tenant was established, that is to say, as to part of the premises between December 3, 1912, and September 29, 1913, and as to the remainder between September 18 and 29, 1913. This, having regard to the nature of the covenants which are implied by law, must reduce the claim to very moderate proportions. As pointed out by Swinfen Eady L.J., the claim of the plaintiff may be rested on the ground that covenants implied by law run with the reversion at common law. A claim so framed would not, however, extend the plaintiff's remedy, but would only leave him in the same position as he would be in under the claim as formulated in the statement of claim. In my opinion the Divisional Court were wrong in directing judgment to be entered for the defendants, and I think the case must go back to the official referee to assess the damages on the footing I have indicated. I agree with the order suggested by the Lord Justice.

*New trial ordered.*

Solicitors for plaintiff: *Sharpe, Pritchard & Co., for G. A. Wootten, Cambridge.*

Solicitors for defendants: *Farrar, Porter & Co.*

W. F. B.

## THE KING *v.* JUDGE PARRY.

1916
*April* 12.

*County Court Practice—Default Summons—Notice of Defence given out of Time but before Judgment signed—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 86, *sub-ss.* 1, 3, 4, *and* 5.

Where a default summons under s. 86 of the County Courts Act, 1888, has been served upon a defendant under sub-s. 1, or the Court has given the plaintiff leave under sub-s. 5 to proceed as if service of it had been effected, the defendant, if he desires to defend, must give notice of defence within the eight days limited by sub-s. 1, or, in the case of an order giving the plaintiff leave to proceed without service, within the time limited by the order. Notice of defence given after the expiry of such time is too late, and the plaintiff is at liberty to sign judgment notwithstanding.

Rule for prohibition to the judge of the Maidstone County Court.

On December 9, 1915, Messrs. E. A. Gardner & Sons issued a default summons out of the Maidstone County Court against Francis Day for the recovery of the sum of 16*l.* 18*s.* 11*d.* for the price of goods sold and delivered. The summons was sent by the registrar of the Maidstone County Court to the bailiff of the Lambeth County Court, within the area of which the defendant resided, but the said bailiff was unable to effect personal service of the summons upon the defendant. The plaintiff thereupon applied for an order under s. 86, sub-s. 5, of the County Courts Act, 1888, for leave to proceed without service, and the registrar of the Maidstone County Court made an order that on the ninth day after the posting of the registered letter thereby directed the plaintiff should be at liberty to proceed as if the defendant had been personally served with the summons in the action, subject to a copy of the summons therein together with a copy of the order being posted to the defendant in a registered letter to the address named in the summons. The summons and order were duly posted to the defendant at the said address on January 27. On February 7 the registrar received notice of the defendant's intention to defend, and he on the same day returned it on the ground that the notice of such intention was sent too late.

On February 23 the plaintiffs signed judgment. The defendant obtained a rule nisi for a prohibition to the judge of the Maidstone County Court against further proceedings on the judgment.

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*Pitman*, for the respondent, showed cause. By s. 86, sub-s. 1, of the County Courts Act, 1888, which deals with the issue of a default summons, it is provided "that if the defendant shall not within eight days after service of the summons, inclusive of the day of service, give notice . . . . to the registrar of the Court from which the summons issued, of his intention to defend, the plaintiff may, after eight days . . . . have judgment entered up against the defendant for the amount of his claim." Here personal service could not be effected, and in that case it is provided by sub-s. 5 that "it shall be lawful for the judge or registrar to order that the plaintiff be at liberty to proceed as if personal service had been effected subject to such conditions as he may think just." The registrar in making the order imposed the condition that the defendant should have one more day—nine days instead of eight. In other respects the provisions of sub-s. 1 apply just as if the summons had been personally served. The time limited by the order expired on February 5. The registrar was right in treating a notice of intention to defend served after that date as out of time; the plaintiff's right to sign judgment had already accrued. The plaintiff in signing judgment was in order, and the Court is empowered to proceed upon it.

*Comyns Carr*, in support of the rule. It is enough if notice of defence is given at any time before judgment is signed, although after the expiry of the time limited by the order; and upon notice so being given it becomes obligatory on the registrar to accept that notice and fix a day for trial. The language of s. 86, sub-s. 3, is perfectly general (1): "Where the defendant shall have given notice of defence." It does not purport to refer to sub-s. 1; it does not say "such notice" or "notice within the time so limited." It is true

1) By s. 86, sub-s. 3, of the County Courts Act, 1888, "Where the defendant shall have given notice of defence the registrar shall, immediately upon the receipt of such notice, send a letter to the plaintiff or his solicitor by post, stating therein that the defendant has given such notice and shall send by post to both plaintiff and defendant notice of the day upon which he shall have fixed that the trial shall take place."

Sub-s. 4: "Where the defendant shall neglect to give such notice the judge or registrar shall, upon an affidavit disclosing a defence upon the merits and satisfactorily explaining his neglect, let in the defendant to defend, upon such terms as he may think just."

that sub-s. 4 says that " Where the defendant shall neglect to give such notice " the Court may let him in to defend upon terms. But there the words " such notice " refer to the nature of the notice, not to the time within which it is to be given; and the necessity of leave to defend arises only where judgment has been signed in the interval. Sub-s. 1 merely defines the plaintiff's rights in the event of the defendant not giving notice of defence within the time limited; it allows the plaintiff to sign judgment forthwith; but in the event of the plaintiff failing to do so it does not bar the defendant from giving notice of defence. The defendant who omits to give notice within the time limited does so at his peril, and if the plaintiff here had signed judgment before February 7 the defendant's subsequent notice would have been inoperative. But the plaintiff did not in fact sign judgment till February 23, and under those circumstances the judgment is bad. There is no reason why the practice of the county court on a default summons should differ from that of the High Court in a case of default of appearance to a writ.

RIDLEY J. It has been contended in support of the rule that although by sub-s. 1 the defendant has eight days within which to give notice of defence, and although the same notice is dealt with in sub-s. 4, that is to say, a notice served within the eight days, yet in sub-s. 3 an entirely different notice is referred to, a notice not limited in respect of time at all provided it is given before judgment has been signed. I cannot think that that is the proper construction. So to construe the words would defeat the machinery of the section. I think that the notice referred to in sub-s. 3 is the same notice as that referred to in sub-ss. 1 and 4, namely, a notice given within the time limited by the section or order as the case may be.

BRAY J. I agree. The defendant's contention is no doubt arguable, but I think it is wrong. He contends that if he has given notice of defence before the plaintiff has signed judgment, whether within the eight days or not, the plaintiff's right to have judgment entered against the defendant is gone. The language of sub-s. 1 is quite free from ambiguity. Immediately upon the expiry of the eight days, if no notice of defence has been given, the plaintiff's right accrues. On the other hand, sub-s. 3 is no doubt

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open to two constructions—" Where the defendant shall have given notice of defence " ; and if that is to be read as meaning " whether after the expiry of the eight days or not " it would be so inconsistent with the earlier sub-section that the two could not be read together, and under those circumstances the later ought to prevail. But I think it ought to be construed so as not to conflict with sub-s. 1, and that it means " where the defendant shall have given notice of defence within the time limited." Sub-s. 4 is against the defendant's contention. It provides that " Where the defendant shall neglect to give such notice " he may under certain circumstances be let in to defend upon terms. There the words " such notice " must refer to sub-s. 1, and the neglect mentioned is neglect to give a notice within the time specified, and not merely before entry of judgment.

AVORY J. I agree. When sub-ss. 1, 3, and 4 of s. 86 are read together the only reasonable construction to put upon the language of sub-s. 3 is that which has been put on it by the other members of the Court.

*Rule discharged.*

Solicitors for applicant : *J. Barrett & Son,*
Solicitors for respondent : *Bracher & Son, Maidstone.*

J. F. C.

## WATERS *v.* MEAKIN.

1916
*April* 12 ;
*May* 2.

*Cruelty to Animals—Rabbit Coursing in Fenced Enclosure—Impossibility of Escape—Protection of Animals Act*, 1911 (1 & 2 *Geo.* 5, *c.* 27), *s.* 1, *sub-s.* 3 (*b*).

A "rabbit coursing meeting" was held in a field of between two and a half and three acres in extent. The field was closely fenced all round with boards and wire netting. The rabbits were brought in crates and were in turn taken out and dropped upon the grass, when the dogs whose turn it was to course were slipped at a point about sixty or seventy yards distant. The rabbits, which, owing to the fence, were unable to escape, were all of them killed.

By s. 1, sub-s. 1, of the Protection of Animals Act, 1911, "If any person (*a*) . . . . shall by wantonly or unreasonably doing . . . . any act cause any unnecessary suffering . . . . to any animal," which by s. 15 is defined to mean a "domestic or captive animal," he shall be guilty of an offence.

By sub-s. 3, "Nothing in this section . . . . shall apply . . . . (*b*) to the coursing or hunting of any captive animal . . . . but a captive animal shall not, for the purposes of this section, be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or if it is under control."

On a prosecution of an official of the meeting under sub-s. 1 :—

*Held*, that, notwithstanding there was no chance of escape, there was evidence on which the magistrate could find that the chasing of the rabbits under the above circumstances was "coursing" within the meaning of sub-s. 3 (*b*), and that consequently no offence against the section had been committed.

*Per* Bray J. : The mere fact that the chasing of the animals takes place in an enclosure from which there is no possibility of escape does not prevent it from amounting to coursing, unless the space is so small as to render it impossible to test the relative coursing abilities of the competing dogs, and thereby to defeat the object of the coursing.

Case stated by the stipendiary magistrate for the Potteries district.

An information was laid by James Waters under s. 1 of the Protection of Animals Act, 1911, against the respondent, Stephen Meakin, charging that he caused unnecessary suffering to certain captive animals, to wit, fifty-five rabbits, by unreasonably causing

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them to be worried by dogs. Upon the hearing of the information the following facts were admitted or proved :—

(*a*) On October 18, 1915, a meeting, which had been advertised beforehand as a " rabbit coursing meeting," and to which the public were admitted on payment, was held on an enclosed part of certain ground known as the Old Port Vale Football Ground, situate at Cobridge. At that meeting the respondent officiated as judge and referee. The proceedings were conducted under printed rules. The dogs used were whippets. Three police constables were present to keep order.

(*b*) The enclosed part of the ground is between two and a half and three acres in area. Its maximum length is 142 yards, and its maximum width 99½ yards. The enclosure is separated from the rest of the ground by a fence and two wooden stands. The fence is made of boards at the top and the bottom, and wire netting in the middle, and is 2 feet 8 inches high. The greater part of the enclosure is grass land, but on three sides of it there is a cinder track, between the grass and the fence.

(*c*) There were several small openings, referred to before the magistrate as " escapes," under the bottom boards of the fence, either due to natural unevenness of the ground, or such as would be made by removing a little of the soil with a shovel. These openings were on an average a foot wide and two or three inches deep. A rabbit chased by dogs as hereinafter mentioned might possibly have squeezed through one or other of these openings into the outer part of the ground had it been able to discern and get to such opening before being overtaken, but of the fifty-five rabbits none did get wholly or partly through any of the said openings, though many of the rabbits got to the fence two or more times before being seized. The fact that a part of the cinder track is inclined or banked up above the level of the grass land rendered some of the openings invisible or less visible to the rabbits. There was a good deal of loud shouting by spectators, persons engaged in betting and others, and this noise contributed to terrify and bewilder the rabbits in their flight.

(*d*) There was in the fence a small entrance through which the public were admitted to the enclosure. In addition thereto there were in the fence two gateways, one about two feet wide, the other about twenty-one feet wide. The latter gateway was blocked by a

table, a large roller, a number of crates in which the rabbits had been brought on to the ground, spectators, persons engaged in betting, dogs, and their attendants. The former gateway was open until the eighth of the rabbits while being chased succeeded in doubling back and getting through the same (just beyond which it was overtaken and seized), when the gateway was closed, and thereafter it remained closed.

(*e*) The chances of escape for the rabbits from the enclosure through the openings, entrance, or gateways were so slight as in fact to be negligible.

(*f*) When a rabbit was taken out of one of the crates it was carried by the respondent, who officiated as judge and referee, and was dropped by him on the grass about sixty or seventy yards in advance of the place where the dogs and their attendants were waiting. One Smith, who officiated as starter, then fired a pistol, and the dogs whose turn it was were then slipped. In many instances the rabbit ran into the fence before the dogs overtook it, and the force of the impact caused it to rebound. In some instances this occurred a second or third time. When, as frequently happened, two dogs seized the same rabbit, one dog usually seized the head and the other the hindquarters, and the rabbit was then dragged about by them until the attendants came up and were able to get it from them. During this time such rabbits could be heard a considerable distance away squealing in pain, and they were undoubtedly then being caused to suffer. If the rabbits when got from the dogs were still alive the attendants then killed them.

For the appellant it was contended that the chasing and worrying of the rabbits in the manner aforesaid in the small enclosure above mentioned, from which enclosure they had no chance of escape, was not coursing within the meaning of s. 1, sub-s. 3 (*b*), of the Protection of Animals Act, 1911; that the rabbits were never liberated, because, although taken out of the crates and dropped upon the grass, they still were restricted in movement to the enclosure; that being so restricted they remained under control; and that therefore the section applied.

For the respondent no evidence was called, but it was contended that coursing did not cease to be coursing because of a limitation of the area within which it took place; that the rabbits when taken

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from the crates were liberated for the purpose of being coursed; that when so liberated they ceased to be under control; and that therefore no offence against the Act had been committed.

The magistrate found that the respondent did cause unnecessary suffering to the rabbits, or many of them, by causing them to be worried by dogs as aforesaid, but in view of sub-s. 3 (*b*) of s. 1 of the Act he held that the section did not apply to the respondent's acts, and he accordingly dismissed the information.

*Stuart Bevan*, for the appellant. There was no evidence on which the magistrate could hold that the chasing of the rabbits under the conditions set out in the case was "coursing." Sub-s. 3 (*b*) says that no animal shall be deemed to be coursed before it is liberated, and it is contended that no animal can be said to be "liberated" unless it is given complete freedom so as to have a chance of escape. Here the chasing took place in a very limited area, so that escape from the dogs was impossible. Having regard to the small size of the enclosure, the rabbits may well be regarded as having still been under control after they had been taken out of the crate. They were under control in the same sense that fish in a stew pond are under control. If the magistrate is to be taken to have found that the chasing was coursing the Court is not bound by that finding. It is not purely a question of fact; it turns upon the interpretation of the statute.

*Graham Milward*, for the respondent. If the Legislature had meant to prohibit rabbit coursing, a form of sport which generally takes place under conditions similar to those in the present case, it would have been very easy to say so. The statute nowhere suggests that the coursed animal is to have a chance of escape. The word "liberated" means nothing more than released from the pen or crate in which it is held captive. Whether the animal after such release remains under control is a question of fact, from the magistrate's finding on which there is no appeal.

*Cur. adv. vult.*

May 2. The following written judgments were delivered:—

RIDLEY J. In this case an information was preferred against the respondent under the Protection of Animals Act, 1911, s. 1, for

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unlawfully causing unnecessary suffering to certain captive animals, namely, fifty-five rabbits, by causing the same to be worried by dogs. The magistrate after hearing the case dismissed the information because although he thought the respondent did cause unnecessary suffering to the rabbits, yet he thought also that what was done was protected by s. 1, sub-s. 3, of the Act, as having been "coursing or hunting of captive animals." It appears that a "rabbit coursing meeting" was held at a place called Cobridge on October 18, 1915, at which the respondent was judge and referee. The dogs were those known as whippets, and the coursing was held upon a portion of a football ground, which portion was surrounded by a fence, from which the chances of escape for the rabbits were "negligible," and from which they could not in fact escape. The rabbits were brought in crates to the meeting and were taken one by one by the respondent out of the crate and dropped on the grass within the enclosure about sixty or seventy yards from the place where the dogs and their attendants were waiting. This enclosure was a space of two and a half to three acres, being 140 yards by 90 or thereabouts. On the rabbit being dropped upon the grass an official fired a pistol and the dogs in turn were slipped upon the rabbit. It is unnecessary further to follow the facts; for undoubtedly there was ample evidence to support the magistrate in his finding that unnecessary suffering was caused to the rabbits. But the question that arises is whether what was done was "coursing or hunting" within the meaning of the Act. The words of the statute are as follows: "Nothing in this section shall apply . . . . (*b*) to the coursing or hunting of any captive animal, unless such animal is liberated in an injured, mutilated, or exhausted condition; but a captive animal shall not, for the purposes of this section, be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or if it is under control." I think that what was done would certainly be called coursing in a popular sense; and it was coursing a captive animal. Nor were the rabbits liberated in an injured, mutilated, or exhausted condition. So far, therefore, the exception given by the Act applies. But it was contended for the prosecution, first, that the rabbits were not "liberated for the purpose of being coursed" because they could not escape from the field, and that in order to be "liberated" they

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must have entire and complete liberty. But it seems to me that the word has only reference to the animal being let out from the crate or basket in which it has been kept captive—in other words, it simply means "let loose." The same word is used in the first sentence "unless such animal is liberated in an injured . . . . condition," and there it certainly has reference merely to the condition of the animal at the time when it is let loose. So it appears to me that the word in the second sentence also means "let loose," and that the animal is none the less liberated because when set free from the basket there was still a limit set to its liberty by the fence which it could not pass. It was secondly contended that even if liberated the rabbits were still "under control" within the meaning of the section; that the limits set to the course by the fence of the field constituted a control; that the words had application while the actual course was taking place. But hunting as well as coursing is included in the section—indeed, they are coupled together; and if it can be shown that in the case of hunting the words must bear a particular sense, it seems to follow that in the case of coursing they must bear a similar sense, at all events not one entirely different. Further, the word "recaptured" placed before the words we are now dealing with suggests that these words are concerned with a control existing after the course or hunt is over. Now in what sense are the words used in the case of hunting a captive deer? When set at liberty the animal is within the exception during the run; but when recaptured and confined again it is not, for it has been recaptured and is under control. So that the period of control is not during but after the hunt. It is true that in this species of rabbit coursing recapture practically does not exist; but I think that when the Legislature dealt with hunting and coursing together it must be taken that it was supposed that it must take place in the one as well as in the other. The words therefore must be read with a like meaning in each case; and on this reasoning they have no application to the period while the course is taking place, and do not include cases where escape is prevented. It would have been easy to use words which would have done so. The magistrate therefore was at liberty to find that the exception of "coursing" included the respondent's acts, and was right in dismissing the information.

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BRAY J. In this case the respondent was charged under the Protection of Animals Act, 1911, s. 1, with having unlawfully caused unnecessary suffering to certain captive animals, to wit, fifty-five rabbits, by unreasonably causing them to be worried by dogs. The summons was dismissed, and at the request of the prosecutor, an inspector of the Society for the Prevention of Cruelty to Animals, this case was stated by the stipendiary magistrate for the Potteries district. The facts appear in the case and may be shortly stated thus: On October 18, 1915, a meeting which had been advertised as a "rabbit coursing meeting," and to which the public were admitted on payment, was held on a part of the Old Port Vale Football Ground at Cobridge. The part in question was between two and a half and three acres in extent, and was enclosed by a fence and other means in such a manner that the chance of escape was so slight as in fact to be negligible. What took place at the meeting is described thus: [He read paragraph (*f*) of the case.] The question turned on the true construction of s. 1, sub-s. 3 (*b*), which is in these terms: [He read the sub-section.] For the appellant and respondent it was respectively contended as follows: [He read their respective contentions as set out in the case.] The magistrate found that the respondent did cause unnecessary suffering to the rabbits, or many of them, but in view of s. 1, sub-s. 3 (*b*), he held that the section did not apply to the respondent's acts, and he therefore dismissed the summons. There were thus three points: (1.) that the chasing and worrying under the circumstances was not coursing; (2.) that the rabbits were not liberated; (3.) that they were under control. These were the points argued before us, and I will take them in their order. As to the first it seems to me that whether it was coursing or not was a question of fact for the magistrate, unless he can hold as a matter of law that if the rabbits had no chance of escape it was not coursing. I cannot so hold. The statute does not provide that the coursing must be conducted in a sportsmanlike or in any particular manner. These rabbit coursing meetings had been held in enclosed grounds for many years before 1911, and if it had been intended to provide that such meetings could not be coursing unless there was a means of escape I think it would have been so provided in terms. It would have been expressly provided that, to be deemed coursing, the rabbits or other captive animals must have a chance of

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escape. It is obvious that whether the space is enclosed or not a number of the rabbits will be captured, and the rabbits captured will suffer the same pain whether other rabbits escape or not. In my opinion it cannot be held that the mere fact that the rabbits have no chance of escape prevents their chasing and worrying from being coursing. Whether the size of the enclosure was sufficient, or whether the way in which the rabbits were chased and worried was coursing, seems to me to be clearly a question of fact. If it took place in a room or other very small enclosure I can understand that it might be found as a fact not to be coursing at all, because it could not possibly afford a test of the coursing abilities of the dogs. The object is to test the coursing abilities of the two dogs which are slipped. The magistrate held that the section did not apply to the respondent's acts, and having regard to the contentions of the appellant and respondent he could not have so held unless he had found as a fact that it was coursing. It is therefore in my opinion quite unnecessary to send the case back to him, and I think we must take it that he so found, and, that being so, we cannot interfere with his finding. I think the appellant's first point failed.

The next point is whether the rabbits were liberated. This again seems to me a question of fact, unless we can hold that because they had no chance of escape they cannot have been liberated. Now the section says "liberated for the purpose of being coursed." They were dropped on the grass sixty or seventy yards from where the dogs were. This is exactly what is done whether the ground is enclosed or not. If the act of cruelty takes place before that moment it is not to be deemed to be coursing. If it takes place after and before recapture I think the section implies that it takes place in coursing. The word "liberated" is used in the earlier part of the section. If the rabbits were dropped down in a mutilated or exhausted condition, and the prosecution was founded on that, surely it could not be contended that they were never liberated at all because the enclosure prevented their escape. Much of what I have said already with regard to the first point applies here. In my opinion the mere fact that the rabbits have no chance of escape does not prevent their being liberated within the meaning of the section. It equally follows from what I have said that the magistrate must have found as a fact that the rabbits were liberated.

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Now as to the third point: Were the rabbits under control when they were chased and worried by the dogs? How can it be said that they were under control? Who could control them? The dogs could to a limited extent drive them this way or that, but that cannot be controlling. This happens in all coursing. The respondent could not, or at all events did not, make the rabbit go this way or that, or make it stop, or control its movements at all. The same considerations apply to this point as to the first two. Can we hold that because the ground is enclosed the rabbits must be under control? The Act of 1911 was partly a consolidating and partly an amending Act, and it seems that the words "after it has been recaptured, or if it is under control" are new. The case of *Rodgers* v. *Pickersgill* (1) was decided in 1910, and these words seem to have been added to meet that case. When the deer there got into the yard it would properly be held to be under control, though not perhaps recaptured; and so here if the rabbits had found refuge in a similar place the magistrate might find them (though it would be a question of fact) to be at that moment under control. So also they would be under control if when being coursed a string had been attached to a leg and held by a man, and I can imagine other cases where they might be said to be under control. But in my opinion they cannot be said to be under control merely because the ground is so enclosed that they cannot escape. I think that here also the magistrate must have found as a fact that the rabbits were not under control while being chased and worried by the dogs. I should much have liked to have decided this case in favour of the appellant. It is a very poor form of sport. But I have to construe the words of the section according to their ordinary and natural meaning, and I can find no words which would justify one in holding that the section in effect provided that the captive animals must have a real chance of escape. I think the appeal must be dismissed.

AVORY J. It is unnecessary to recapitulate the facts and contentions which are set out in the judgments of Ridley J. and Bray J. I agree that the chasing of rabbits by dogs in enclosed grounds must have been known to the Legislature in 1911, and therefore may be under some circumstances within the exception provided for in

(1) (1910) 74 J. P. 324.

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s. 1, sub-s. 3 (*b*), of the Protection of Animals Act, 1911; but I am not satisfied that the magistrate has exercised his judgment upon the question of fact whether under the circumstances of this case what took place could properly be described as "coursing." The mere fact of a rabbit being let loose in the view of dogs who chase it does not amount to coursing. I agree that the expression "liberated" in the sub-section means "set free from the receptacle in which the animal has been confined," and that these rabbits were therefore liberated; but I see no reason for holding that the expression "or if it is under control" is to be limited in its operation to the time when the course or hunt is over. I think the proper reading of the latter part of the sub-section is that an animal shall not be deemed to be coursed or hunted, although it has been liberated for the purpose, if it is under control, and an animal may, I think, be under control in a confined space although free to move in different directions for a certain distance. In my opinion it was open to the magistrate, having regard to the extent of the enclosed ground, to the fact that the rabbits had no chance of escape, and to the description of what in fact took place, to find that this was not "coursing" within the meaning of the statute, and in the sense in which it is understood as a sport, and that the case should be remitted to him to state whether he has found as a fact that this was coursing in that sense. The finding of the magistrate that the section did not apply to the respondent's acts appears to me consistent with the view that upon the facts and the contention of the respondent he was bound to hold that the exception applied.

*Appeal dismissed.*

Solicitor for appellant: *Sydney G. Polhill.*

Solicitors for respondent: *Doyle, Devonshire & Co., for J. E. Moxon, Hanley.*

J. F. C.

[IN THE COURT OF APPEAL.]

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*Nov.* 24, 25, 26.

## MANLEY *v.* BURN.

*Land—Right of Support—House built over partly worked Mine—Working of Mine by new Owner—Subsidence caused by Working—Liability of Mine Owner.*

The plaintiff was the owner of a piece of land lying over a coal mine, and of a house which he built thereon in the year 1895. Prior to 1885 a large quantity of coal in the upper strata lying beneath the plaintiff's land had been excavated by the then mine owners, who, however, left pillars of coal sufficient to support the land and house of the plaintiff. In 1885 the defendant became lessee of the coal mine, the lower strata of which he worked until 1908, when his working resulted in a subsidence of the surface with resulting damage to the plaintiff's house :—

*Held*, that the defendant was liable for all the damage caused by the subsidence, including any damage that might be attributed to the condition in which the upper strata had been left by the previous owners of the mine.

*Birmingham Corporation* v. *Allen* (1877) 6 Ch. D. 284 and *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127 distinguished.

APPEAL of the defendant from the decision of Lord Coleridge J. at the trial without a jury at Newcastle-on-Tyne. The facts were substantially as follows :—

In May, 1895, the plaintiff purchased from the Townley estate a piece of land, which was situated on the edge of a barrier separating the West Stanley coal mine from the adjoining collieries ; in the same year the plaintiff built a small house on the land, which did not materially add to the weight to be carried by the subjacent soil. Prior to the year 1885 the upper seams of coal beneath the plaintiff's land had been worked to a large extent by their then owners, but large pillars of coal had been left unworked, and, generally, sufficient support had been left for the plaintiff's land and house. In 1885 the defendant became lessee from the Townley estate of the seams of coal lying underneath the plaintiff's land ; he worked these seams, chiefly the lower ones, until 1908, when a subsidence occurred, which caused injury to the plaintiff's house. The plaintiff now sued the defendant for damages on the ground that the subsidence was caused

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or contributed to by the way in which the defendant had worked the coal in the underlying strata without leaving proper or sufficient support. After hearing the evidence, Lord Coleridge J. found that the subsidence had been caused or contributed to by the defendant's workings, and gave judgment for the plaintiff for 150*l.*, which had been agreed by the parties as the amount of the damages on the assumption that the defendant was liable.

The defendant appealed.

*Lowenthal* and *Mundahl*, for the defendant. The evidence did not warrant the learned judge in holding that the defendant's workings caused or contributed to the subsidence. But, even assuming that they did cause or contribute to it, the defendant is still not liable. Before the defendant became lessee of the coal the land on which the plaintiff's house was subsequently built had already been honeycombed by the workings of their predecessors in title. The plaintiff had acquired no prescriptive right of support for his house, and *Birmingham Corporation* v. *Allen* (1) and *Darley Main Colliery Co.* v. *Mitchell* (2) are authorities against his right to recover damages from the defendant. The defendant's obligation was to support the land in its natural condition, and not in the weakened condition that had been caused by the workings of his predecessors in title. The defendant's workings would have caused no damage but for the antecedent workings, which weakened the support to the surface.

[SWINFEN EADY L.J. Is not the result of that to impose a heavier burden on the defendant to support the plaintiff's land whilst he is working the coal ?]

It is submitted that it does not, and that the plaintiff has a right of action against the first excavators, though they did not themselves let down the soil. They left the land in such a state that if any one else worked the mine he would bring it down. The appeal is mainly on the findings of fact. [They also cited *Partridge* v. *Scott* (3), *Williams* v. *Bagnall* (4), *Woodall* v. *Hingley* (5), and MacSwinney on Mines and Minerals, 4th ed., p. 304.]

(1) 6 Ch. D. 284.
(2) 11 App. Cas. 127.
(3) (1838) 3 M. & W. 220.
(4) (1866) 15 W. R. 272.
(5) (1866) 14 L. T. 167.

*Tindal Atkinson*, *K.C.*, and *Meynell*, for the plaintiff. There is ample evidence that the damage was referable to workings by the defendant since 1895. The plaintiff's right does not depend so much on the right of support as on the right to enjoy his property without being interfered with: see Lord Cranworth in *Backhouse* v. *Bonomi*. (1) The contention that the defendant is only liable for damage arising from excavations made after his entry is not tenable; *Birmingham Corporation* v. *Allen* (2) is not an authority for such a proposition.

*Mundahl* in reply.

SWINFEN EADY L.J. This is the appeal of the defendant from the judgment of Lord Coleridge J. at the trial of the action without a jury at Newcastle-on-Tyne. The plaintiff claims damages for subsidence and recovered 150*l*. damages. The plaintiff's premises consist of a miner's house or cottage, No. 8, Lucy Street, Stanley, in the county of Durham. Before the trial the parties agreed that the house had been damaged, and that the amount of the damage was 150*l*.; so there is no conflict on that head. But the defendant denies his liability. It is not disputed that the damage has arisen from colliery workings at some time; the dispute is as to whether the defendant occasioned the injury. The plaintiff's house had not been built twenty years, so that it had not acquired any prescriptive right of support, but it was agreed that the subsidence was not caused by the weight of the building, which was so small that it might be disregarded. The plaintiff acquired the title to the ground on which his house was built by a conveyance of May 25, 1895, from the Townley estate, through whom the defendant also claims as lessee. The plaintiff built and occupied his house in 1895. It appears that no damage was caused to the house prior to 1908, so that the plaintiff's house remained uninjured for thirteen years from the date when it was built. Below the house are various seams of coal, in which there have been workings at divers times. [His Lordship here discussed the evidence at length and came to the conclusion that the defendant's workings had caused or contributed to the injury to the plaintiff's house, and went on as follows:] It was contended by the defendant that, even on that footing, he was under no liability

(1) (1861) 9 H. L. C. 503. (2) 6 Ch. D. 284.

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unless it could be shown that, if all the coal in the seams above his workings had been left unworked, the subsidence with its resulting damage would necessarily have happened as the result of the defendant's own workings. He contended that his liability was not to be increased by having to work in or beneath land that had been, so to speak, honeycombed ; but if it is once established that, by reason of adequate support not being left, the defendant's workings have occasioned the subsidence and have so damaged the plaintiff, as is established in my opinion by the evidence, he must pay for the increased damage caused by the state of the superincumbent strata. But for the defendant's wrongful act there would have been no damage to the plaintiff, and to that wrongful act all the damage must therefore be attributed. As the risk of damage arising if proper support was not left was increased by the condition of the upper seams, it was all the more incumbent upon the defendant to leave adequate support.

The defendant relied on *Darley Main Colliery Co.* v. *Mitchell* (1), but that case does not assist him ; it proceeded on the admission that if the mine owners had left sufficient support the working by the adjoining owner would have done no harm. Thus the damage was all caused by the original working and was not caused, as in the present case, by the further working of subjacent coal. Here the damage was directly attributable to the defendant working the subjacent coal without leaving proper support. In my opinion the judgment of Lord Coleridge J. was quite right, and the appeal should be dismissed.

PICKFORD L.J. I am of the same opinion. I shall say but little of the point of law taken on behalf of the defendant. He contended that, even if his workings had caused the damage to the plaintiff, he was under no liability, because the damage would not have taken place but for the previous workings before he began working himself. As to this, I will only say that the cases cited do not, in my opinion, apply to the facts of the present case, and I think that, if the acts of the defendant contributed to the subsidence and the letting down of the plaintiff's house, he is liable. As to the evidence, I think it points to the damage being contributed to by the defendant.

(1) 11 App. Cas. 127.

The plaintiff says there must have been a new cause to produce the damage. The defendant says that it must have been going on all the time and that what happened was merely a fresh subsidence of an old subsidence. But the evidence shows that the old subsidence had come to an end and that it is probable that the defendant's workings produced the unfortunate result. I agree that the appeal should be dismissed.

BRAY J. I am of the same opinion. At the trial the material question was whether the acts of the defendant caused or contributed to the subsidence, which Lord Coleridge J. found in favour of the plaintiff. Unfortunately there was a clear misapprehension by the learned judge of the date of certain of the defendant's workings, and it is necessary to look at and decide the question on the evidence. [His Lordship then scrutinized the evidence and went on.] I have come to the conclusion that the theory of the defendant's experts is unsound and that the theory of the plaintiff's experts expresses the true conclusion to be arrived at.

A point of law was also raised before us—that, although the defendant's acts did contribute to the damage, there would have been no subsidence if the upper strata had been left in their natural state. Although this point was not raised at the trial, we must consider it. What authority is there for such a proposition? The authority mainly relied upon is *Birmingham Corporation* v. *Allen* (1); the case of *Darley Main Colliery Co.* v. *Mitchell* (2) in my opinion carries it no further. In my view the first-named case is clearly distinguishable from the present case. There the whole question was as to adjacent, not subjacent, land, and the Court held that the defendant was not an adjacent owner. Another distinction is that in that case the defendant was never owner of the intervening land between his and the plaintiff's, whereas here the defendant is owner of all the subjacent seams beneath the plaintiff's land. In my opinion the liability of the defendant was in respect of the whole of the subjacent soil, and if he has caused damage by workings in any part of it he is liable. If this were not so, the plaintiff's only remedy would be against the original lessees. But no action would lie against them, for they left sufficient support for the surface, and no action would lie

(1) 6 Ch. D. 284. (2) 11 App. Cas. 127.

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against them for merely weakening the support so long as sufficient support remains. In my opinion the defendant was liable notwithstanding the acts of the original lessees, and the appeal fails.

*Appeal dismissed.*

Solicitors for plaintiff: *Nash, Field & Co., for W. M. Pybus & Sons, Newcastle-on-Tyne.*

Solicitors for defendant: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

W. J. B.

C. A. 1916 *March* 24, 28, 29.

[IN THE COURT OF APPEAL.]

## COLCHESTER BREWING COMPANY, LIMITED *v.* LICENSING JUSTICES FOR TENDRING DIVISION OF ESSEX.

*Licensing Acts—Licence—Renewal—Reference to Compensation Authority—Evidence—Differentiation—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19.

The question of the renewal of the licence of an ante-1869 beerhouse was referred by the licensing justices to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, on the grounds that the house was unnecessary and that there was ample licensing accommodation in the district without it. Evidence was given before the compensation authority as to the situation, description, and trade of the house and of other licensed houses in the district and their number, and an ordnance plan of the locality was put in. There was no evidence that the house compared unfavourably with the other houses in the district, and there was some evidence that it was in some respects a better house than the licensed house, a beerhouse situated next to it. The compensation authority refused the renewal of the licence:—

*Held*, affirming the decision below, first, that the compensation authority was acting in a judicial capacity when determining whether the licence should be refused, and could therefore only act upon legal evidence.

*Held*, further, that, although there was no evidence that the house compared unfavourably with the other houses in the district, there was evidence on which the compensation authority was entitled to refuse the renewal of the licence.

APPEAL from the decision of a Divisional Court (Lord Reading C.J., Lord Coleridge and Avory JJ.) (reported [1915] 3 K. B. 48) upon a case stated by the licensing committee of the Court of quarter sessions

for the county of Essex sitting as the compensation authority under the provisions of the Licensing (Consolidation) Act, 1910.

The appellants were the registered owners of an ante-1869 beerhouse known as the Princess Alexandra situate at Manningtree in the said county (hereinafter called " the said beerhouse ").

On January 19, 1914, the respondents as the licensing justices for the district of Tendring, in which the said beerhouse was situate, caused to be served on the licensee thereof a notice of objection to the renewal of the existing on-licence in respect of the said beerhouse on the grounds " (1.) that the said licensed premises are unnecessary and (2.) that there is ample licensing accommodation near the said premises."

At the general annual licensing meeting for the district of Tendring on February 2, 1914, the licensee of the said beerhouse applied for the renewal of the licence, but the respondents as the licensing justices. being of opinion that the question of its renewal required consideration on grounds other than those on which the renewal thereof could be refused by them, decided to refer the matter to the quarter sessions under s. 19 of the Licensing (Consolidation) Act, 1910.

Accordingly on February 2, 1914, the said justices referred this matter and three other houses in the parish to the quarter sessions and reported thereon in the following terms :—

" That in our opinion the above houses are unnecessary, and that there is ample licensing accommodation in the district without them.

" The Princess Alexandra beerhouse, Manningtree.

" This is an ante-1869 beerhouse at Brook Street, Manningtree.

" Number of licensed houses in the parish, five full, three beer on, two beer off.

" The population of Manningtree in 1911 was 887, which equals one on license to every 111 persons.

" Number of licensed houses

| | | | |
|---|---|---|---|
| within 100 yards | None full. | None beer on. | None beer off. |
| ,, 200 ,, | Two ,, | Two ,, | Two ,, |
| ,, 300 ,, | Five ,, | Two ,, | Three ,, |
| ,, 400 ,, | Six ,, | Three ,, | Three ,, |

" Nearest licensed house :

" (*a*) Full. The Red Lion. 166 yards.

" (*b*) Beer on. The Swan. 120 ,,

" Character of neighbourhood, working class.

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"Particulars as to the:—

"Situation and whether draw up. Situate at the top of Brook Street, Manningtree, and has no draw up.

"Accommodation. Four bedrooms, taproom, small smoke room, private sitting room, kitchen and underground cellar, stabling for six horses, coachhouse for two traps, yard and large garden.

"Structure. Brick and slate.

"Facilities for supervision (*a*) by police, good; (*b*) by licensee, good.

"State of repair. Fair.

"Class of persons using house. Working classes.

"Comparison with nearest licensed house. This house compares favourably with the 'Swan,' which has less accommodation.

"Annual value for income tax, Schedule A, 22*l*.

"Trade, draught beer in average number of barrels per annum. About 210 barrels.

"Bottles, beer, average number of dozens per annum. About 520 pints.

"These are the figures supplied to the police by the licensee.

"The owners decline to supply the exact figures to enable the average to be arrived at.

"Annual rent paid by present tenant. 12*l*.

"Number of tenants of house during last five years. Two.

"Number of convictions during same period. None.

"The licensee works for the Tendring Hundred Water Company when required by them.

"The respondents, the said licensing justices, reported to the quarter sessions three other houses in the same parish, namely,

"The Packet. Full license
"The Forresters' Arms, Beerhouse and
"The King's Head. Full license

but did not report the Swan."

At the hearing before the licensing committee of the Court of quarter sessions the above-mentioned report was put in evidence and considered by the committee, and Police Inspector Howlett verified the statements therein as to the number of licensed houses in the district, the character and population of the locality, and the respective distances of the said beerhouse and other licensed houses

above referred to and their respective accommodation, except the Swan, and a plan showing the situation of all the licensed houses in the parish was produced and was attached to the case.

It was proved that the said beerhouse was the only licensed house situate at the top of the steep hill above Manningtree and that it was the most isolated as regards the proximity of other licensed premises in the parish, and evidence was given on behalf of the licensee that the trade of the said beerhouse had continually increased during the past twenty years, and this was not cross-examined to. It was stated by Inspector Howlett, the only witness called by the respondents, that in his opinion there was a redundancy of houses in the parish, but that the said beerhouse suited the requirements of the neighbourhood; that it served a district of its own; that the nearest licensed house was the Swan above referred to and that it was a better house than the Swan, it having recently been done up; and particulars of the trade for nearly the last three years, showing that the trade had increased in that period, were given.

No evidence other than that referred to in the preceding paragraph was given to differentiate the said beerhouse from any of the other licensed houses in the district.

It was objected on behalf of the licensee and registered owners that there was no evidence before the quarter sessions entitling them to refuse to renew the licence, but the Court, having heard the applications for renewal in respect of all four of the houses in the said parish, referred to them before giving their decision in any case, refused the renewal of the licence of the said beerhouse, and also refused to renew the licences of each of the three other houses reported to them by the licensing justices.

The question for the opinion of the Court was whether there was any evidence before quarter sessions upon which they were entitled to and legally could refuse the renewal of the licence of the said beerhouse.

The Divisional Court held that, although there was no evidence that the house compared unfavourably with the other houses in the district, there was evidence on which the compensation authority was entitled to refuse the renewal of the licence.

The Colchester Brewing Company appealed.

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*A. F. Wootten* (*Claughton Scott* with him), for the appellants.

*Hohler*, K.C. (*C. E. Jones* with him), for the respondents.

The arguments and the cases cited were the same as those in the Divisional Court.

*Hohler*, K.C., contended in addition that all the cases since the Act of 1904 had been wrongly decided.

March 29. SWINFEN EADY L.J. read the following judgment:— This is an appeal from a decision of a Divisional Court upon a case stated by the licensing committee of the Court of quarter sessions for the county of Essex sitting as the compensation authority under the provisions of the Licensing (Consolidation) Act, 1910. The appellants are the registered owners of an ante-1869 beerhouse known as the Princess Alexandra at Manningtree. The case before the Divisional Court is reported in [1915] 3 K. B. 48, where the facts are fully set out; they need not be repeated.

The appellants contended that the order of the Divisional Court was erroneous upon the ground that the licensing committee of the Court of quarter sessions were exercising the powers committed to quarter sessions by the Licensing Act, and in so doing were acting judicially, and in that capacity could only act upon evidence on oath, and that there was no such evidence before the committee upon which they could arrive at the conclusion that the particular licensed house in question—the Princess Alexandra—was unnecessary for the wants of the neighbourhood and superfluous, and could on that ground refuse to renew the licence.

It was contended by the respondents, on the other hand, that the licensing committee were not acting judicially, but in an administrative capacity; that they were at liberty to act without evidence on oath and merely upon statements made to them, or upon facts within the knowledge of individual justices who were members of the committee. It was also further contended by the respondents that if the true position be that they were acting judicially and could only arrive at a conclusion that the Princess Alexandra was unnecessary for the requirements of the neighbourhood on legal evidence, then there was such evidence in the present case.

For the purposes of the Licensing Act, 1910, the compensation authority are quarter sessions: see s. 2, sub-s. 2 (*c*). By s. 6,

sub-s. 1, when the compensation authority are the quarter sessions of a county, they shall delegate their power of determining any question as to the refusal of the renewal of a justices' licence under the Act, and matters consequential thereon, to a committee. The Act of 1910 repealed but incorporated and re-enacted the provisions of the Licensing Act, 1904. Shortly after the Act of 1904 came into operation it was decided by the King's Bench Division in *Rex* v. *Southampton Licensing Justices* (1) that the jurisdiction committed to the compensation authority of a county by that Act was not given to a new statutory body created by that Act and exercising administrative functions, but that the body spoken of as quarter sessions was meant to be the Court of quarter sessions of the county, and that the committee, to whom the duty of exercising the powers is delegated, exercise the powers of quarter sessions, and in so doing are acting judicially, and have power to state a case for the opinion of the King's Bench Division. Lord Alverstone said (2): "Further, the provision in the 5th section of the Act of 1904, that quarter sessions shall delegate their powers of dealing with the renewal of licences under the Act to a committee, seems to me to shew that the lesser body, the committee to whom the duty is delegated are exercising the powers of quarter sessions. That being so, I come to the conclusion that upon such an inquiry so conducted, and such a decision, it is an instance of a new jurisdiction being given to a Court to act through a committee of its members, and that the principle applies that where a new jurisdiction is given to a Court, prima facie that Court is to exercise that jurisdiction in accordance with all its ordinary powers. It seems to me that, subject to the committee of quarter sessions exercising their discretion on the application on the merits, they had the power to either state a special case or to frame an order stating such facts as would make it a speaking order, and would enable this Court to exercise a judgment on the question whether or not the order was good or bad." In so deciding the Court followed what was said by James L.J. in *The Rev. T. Pelham Dale's Case* (3): "If a new jurisdiction is given to an existing Court —that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction

(1) [1906] 1 K. B. 446. (2) [1906] 1 K. B. 450.
(3) (1881) 6 Q. B. D. 376, 450.

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be so given to a well-known Court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance." Then followed the decision in *Dartford Brewery Co.* v. *County of London Quarter Sessions* (1), that the quarter sessions, when considering the refusal of a licence, can only act upon evidence given upon oath before them.

In 1907, in *Howe* v. *Newington Licensing Justices* (2), the same opinion was expressed by a Divisional Court differently constituted, namely, that the committee of quarter sessions, acting as compensation authority, can only act on legal evidence. The judgment in this case was affirmed on appeal. (3)

It was after this judicial exposition of the true intent and meaning of the Act of 1904 that the Act of 1910 was passed, which re-enacts the same provisions, and the language of James L.J. in *Ex parte Campbell* (4) is applicable: "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them. I consider, therefore, that the Legislature, in repeating these words in the Act of 1861, must be taken to have adopted the meaning put upon them by the Court of Queen's Bench." It must now, in my judgment, be considered as settled that a county compensation authority is acting judicially when determining whether the renewal of a licence should be refused, and accordingly can only act upon legal evidence, and may state a case, and that the present case has been properly stated. I may add that even before licensing justices, where the holder of a justices' licence applies for the renewal of his licence, the justices cannot receive any evidence with respect to the renewal of the licence which is not given on oath: Act of 1910, s. 16, sub-s. 6.

There remains the question whether there was any evidence upon

(1) [1906] 1 K. B. 695.
(2) [1907] 2 K. B. 340.
(3) [1908] 1 K. B. 260.
(4) (1870) L. R. 5 Ch. 703, 706.

which the compensation authority could refuse the renewal. The licensing justices had reported this house, with three others, as being in their opinion unnecessary. At the principal meeting of the compensation authority there was evidence on oath given by an inspector of police verifying the statements in the report as to the number of licensed houses in the district, the character and population of the locality, and the respective distances of the several licensed premises from the house in question and their respective accommodation, except the Swan, and an ordnance plan was put in without objection. Evidence was also given with regard to the situation of this particular house, and, on behalf of the licensee, with regard to the trade of the house. It appeared that there was a fully-licensed house—the Red Lion—within 166 yards, and a house licensed for the consumption of beer on the premises—the Swan—within 120 yards. Under these circumstances it cannot be maintained that there was no evidence before quarter sessions upon which they could refuse the renewal of the licence of the beerhouse in question on the ground that that particular house was unnecessary. It was pointed out that according to the evidence the present house was a better house than the Swan beerhouse, which had not been presented, but there is no obligation upon the licensing authority to arrange the houses in order of merit and close first the lowest house on the list. If there was evidence upon which the authority could decide that the licence of the Princess Alexandra was unnecessary, their decision is valid, even although the house to be closed compares favourably with another licensed house which has not been dealt with. It is not open to us to review the decision of the compensation authority, if it was one which they could lawfully come to on the materials before them, but I share the view expressed by Avory J. in the Divisional Court, and I should have been more satisfied if the justices had given some reason for deciding that this particular house was not required.

PICKFORD L.J. I agree that this appeal fails, and I also agree that it would have been very much more satisfactory if we had known upon what grounds the compensation authority acted; because upon the materials before us it does seem to me a little bit difficult to understand the position; but that very likely arises from the

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fact that we have not got all the materials before us; and at any rate we have not to consider whether the decision in our opinion was right or wrong; we have only got to consider whether there was any evidence upon which the compensation authority could act as they have acted. I think there was evidence. The evidence which has been mentioned is some evidence upon which they could act. I also think that, assuming what appeared upon the ordnance sheet to have been proved or admitted before the justices, the relative positions of different houses with regard to the distribution of population is a matter which they are entitled to look at. Two objections were taken to that proposition: one, that it was decided by *Raven* v. *Southampton Justices* (1) that the ordnance sheet could not be looked at at all; and, secondly, that there was nothing on the face of this case to show that anything more was done than to put in the ordnance sheet, which of course is not a document which proves itself, but has to be either proved or admitted. To deal with the second point first: I do not think that that is a fair way of reading the case as stated. I think, although it is not stated in express words, that there was oral evidence as to the contents, if I may call it so, of the ordnance sheet; and that it must be taken upon the case as stated that it either was proved, or else was put in in the way in which these ordnance sheets are constantly put in in licensing matters, and in other matters too, with the consent of both sides. If there had been any point that it was not proved and therefore was not evidence, I think it should have been very much more clearly stated, and I do not think that to assume that would be, as I have said, fairly to read this case. I do not think that *Raven* v. *Southampton Justices* (1) does establish the point for which it is so often cited, that an ordnance sheet and its contents, if properly proved, cannot be looked at at all. It may very well be, and I should think it very likely was the case, that in that case it might show nothing at all. It was an ordnance sheet representing a densely populated part of a densely populated town, Southampton, and it may very well be that that ordnance sheet in that case showed nothing at all except a number of houses in one district or included in one district, or in two or three districts exactly like one another. In that case no inference, very likely, could be drawn; and I do not think that *Raven* v. *Southampton Justices* (1)

(1) [1904] 1 K. B. 430.

decided anything more. If it decided that the compensation authority are not entitled to look at an ordnance sheet the contents of which are properly proved or admitted, and that it is no evidence at all and they cannot look at it to see the relative position of houses and population, in my opinion, with great respect, I dissent from that judgment and that decision. But I do not think it does decide that; and I think, assuming the ordnance sheet to be fairly and properly proved, they are entitled to look at it, and to look at it exactly as if the evidence which it affords had been given verbatim, which would have taken a great deal longer and been written down word for word as it came from the mouth of the witness who was giving it. It is only a shorter way of doing the same thing. The witness, instead of saying everything that appeared upon the ordnance sheet in words, says "That ordnance sheet correctly represents the state of things." In that case in my opinion it is open to the justices to look at it. It may be, as in this case, that great qualifications ought to be made, because the ordnance sheet was not of recent date, and there may be a number of other things that ought to be considered; but I cannot agree that in no case are they entitled to look at what it shows, assuming that it is properly proved. For these reasons I think there was evidence upon which the compensation authority could act. It is not for me or for this Court to say whether, upon the materials before us, we should have come to the same conclusion. I agree that this appeal must be dismissed.

BANKES L.J. I agree. The Licensing Act, 1904, for the first time provided that compensation should be paid in respect of any old on-licence the renewal of which was refused on any other ground than on those set out in the schedule to the statute; and the statute also set up a tribunal, the compensation authority, who should deal with the question of compensation; and it defined the principles upon which compensation should be assessed, and it set up the machinery by which the compensation should be arrived at and divided. After the passing of the Act the question constantly came before the Courts as to what the exact position and authority of the compensation authority were; and in a number of decisions in which Lord Alverstone C.J. took part and in some other decisions it has been over and over again laid down that the

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compensation authority was a judicial authority and must act judicially. Some of the cases have already been referred to by Swinfen Eady L.J., and I need not mention them again. There were some decided in the year 1906, and there were some decided in the year 1907; but there is only one which I will mention, and that is the case of *Howe* v. *Newington Licensing Justices.* (1) In that case the question was whether the compensation authority were entitled to consider evidence outside the report of the justices which had been made to them referring the licence for compensation; and in giving the decision in that case Lord Alverstone C.J. repeated emphatically what he had said before. He says (2): "The cases shew that the committee of quarter sessions can only act on legal evidence, but they nevertheless have a very wide discretion as to the matters which they may take into consideration." That decision was appealed, and it came before the Court of Appeal, and is reported [1908] 1 K. B. 260. The point was not directly in issue in that case, but the Court of Appeal, consisting of Lord Halsbury, Sir Gorell Barnes, and Bigham J., who had the decision of Lord Alverstone before them, dismissed the appeal without any reference at all to any question as to whether or not Lord Alverstone's view was the correct one. Therefore I think we may take it that both in the Divisional Court, and to that extent in the Court of Appeal, the view has been adopted, since the passing of the Act of 1904, that the compensation authority is a judicial authority and must act judicially. Before us yesterday Mr. Hohler argued strenuously that those decisions were all wrong, and that they had been arrived at by ignoring the language of the statute (s. 19) and by paying no attention to the language of r. 37, which expressly provided that it was within the discretion of the compensation authority whether they should hear evidence upon oath or not. He also pointed out the extraordinary result which these decisions have landed people in, namely, that the compensation authority for a county can state a special case, whereas the compensation authority for a borough cannot. I must say for myself that, if the question was open for decision, I think that there is a great deal in what Mr. Hohler contended. After all those decisions had been given the Licensing (Consolidation) Act, 1910, was passed; and the material provisions of the Act of 1904 with reference to the

(1) [1907] 2 K. B. 340. (2) [1907] 2 K. B. 343.

compensation authority were expressly re-enacted in the same language as had been used previously. Under those circumstances, in my opinion, the case is one in which we must apply the principle laid down by James L.J. in *Ex parte Campbell* (1), where he said: "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them. I consider, therefore, that the Legislature, in repeating these words in the Act of 1861, must be taken to have adopted the meaning put upon them by the Court of Queen's Bench." Applying that doctrine, it seems to me that it is not open to this Court to consider whether Mr. Hohler's contention is correct or not. The result, therefore, is that the compensation authority must be treated as a judicial authority, and it must act judicially, and have the right to state the special case upon which our opinion is asked.

That being so, the only question is whether or not this compensation authority had evidence before them upon which they could properly act. The words of the case are: "The question upon which the opinion of this Court is desired is whether there was any evidence before the Court of quarter sessions upon which they were entitled to and legally could refuse the renewal of the licence of the said beerhouse, and if not what should be done in the premises." It seems to me, upon a consideration of the cases, that a great deal of confusion has arisen from not keeping distinct the position as it is presented to the licensing justices, and the position as it is presented to the compensation authority. When the matter is before the licensing justices they have two things to consider and determine—first of all, whether the number of licences in the particular district with regard to which they are acting is in excess of the number required by the public; and, secondly, if they come to the conclusion that it is, which of the licences shall be referred to the compensation authority. But when the matter is before the compensation authority, the position, so far as they are concerned, is this. They have also to consider whether, upon the evidence

(1) L. R. 5 Ch. 703, 706.

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before them, the number of licences is proved to be in excess of the number required for the district. But the second question they have to consider is one quite different from the one before the licensing justices, because they have to consider whether there is evidence before them which in their opinion is sufficient to justify them in refusing to renew the licence of the particular house or houses which have been referred to them by the licensing justices. In the present case it is admitted that there was ample evidence to justify the compensation authority in coming to the conclusion that the number of licensed houses in this district was in excess of the wants of the locality. They had four houses referred to them, with regard to one of which only any question arises; and with regard to that house the evidence was that there were within 200 yards of it six other licensed houses, two full, two beer on, two beer off; one of them within 166 yards, a full licence, and a beer on within 120 yards. It is quite true that the fact that there were those six houses within 200 yards of that house is equally evidence against any of the other five; but the question for the compensation authority being whether there was evidence with regard to this particular house, it seems to me that the fact that there were this number of houses within that short distance of this particular house was evidence upon which they were entitled to act if they thought proper; and that this at any rate was a house which was in excess of the wants of the neighbourhood. But in addition the justices had a copy of the ordnance sheet; and I quite agree with what Pickford L.J. has said about the ordnance sheet. Assuming that proper evidence is given to show that the ordnance sheet fairly represents the locality at the time when the justices or the compensation authority are asked to look at it, in my opinion it may be very valuable evidence to assist them in coming to the conclusion whether any particular licence is or is not required for the wants of the neighbourhood. I think that the decision in *Raven* v. *Southampton Justices* (1) has been very much misunderstood. I do not think that either of the learned judges who were the majority there did decide or intend to decide that under no circumstances could an ordnance sheet be made use of, or that under no circumstances could it be of any assistance. I think the decision in that

(1) [1904] 1 K. B. 430.

case was confined to the particular facts of the case, and that particularly Lord Alverstone was pointing out that in his opinion in that particular case that particular ordnance sheet afforded the justices no assistance. If that case is to be interpreted or considered as an authority that under no circumstances can an ordnance sheet be made use of, in my opinion it is wrong; but I do not think that that is the proper construction to be put upon the case; and I agree with what Pickford L.J. has said about it. In my opinion there was evidence here upon which the compensation authority were entitled to act; and on those grounds I think the appeal fails.

*Appeal dismissed.*

Solicitors for appellants: *Boxall & Boxall, for Thompson Smith & Son, Colchester.*

Solicitors for respondents: *Doyle, Devonshire & Co., for Jones & Son, Colchester.*

W. J. B.

*Applied.* PEEK *v.* PEEK. [1948] 2 All E.R. 297.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
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*Feb.* 18.
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*March* 20, 21,

## ISAACS & SONS *v.* SALBSTEIN AND ANOTHER.

*Action—Judgment for Price of Goods sold—Judgment unsatisfied—Subsequent Action against another Person for Price of same Goods—No Joint Contract—Action not barred by the Judgment.*

When there is no joint contract or relation of principal and agent, an unsatisfied judgment against one person for the price of goods sold is not a bar to a subsequent action against another person for the price of the same goods.

The test of whether an appeal is final or interlocutory is the nature of the order immediately under appeal. Where, therefore, on appeal from a final judgment of a county court, a Divisional Court made an order for a new trial:—

*Held*, that an appeal from the Divisional Court to the Court of Appeal was an appeal from an interlocutory order and was rightly entered in the interlocutory list.

APPEAL from the City of London Court.

In June, 1914, the plaintiffs issued a writ against "Salbstein Brothers" claiming the sum of 20*l.* for the price of lemons, which was

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served upon one Julius Salbstein, who was alleged to be a partner in Salbstein Brothers, at the shop where it was alleged that Salbstein Brothers carried on business. On July 19, 1914, judgment in default of appearance was recovered in that action against Salbstein Brothers for 20*l.* and costs; but that judgment remained wholly unsatisfied. In March, 1915, the plaintiffs commenced the present action in the High Court against H. Salbstein and his wife, E. Salbstein, to recover the sum of 20*l.* for the price of the same lemons. Upon an application for judgment under Order XIV. an order was made giving the defendants leave to defend and remitting the action to the City of London Court. The particulars of claim delivered by the plaintiffs in the City of London Court were: "August, 1913, Balance of account re sale of lemons, 20*l.*" The order for the lemons was in fact given to the plaintiffs by the defendant H. Salbstein, but, as the defendants alleged, as agent for his wife. The account originally made out by the plaintiffs was to "Mr. Salbstein." At the trial, with a jury, in the City of London Court the learned deputy judge held that the claim was merged in the judgment in the High Court, and that there was therefore no case to go to the jury; and he gave judgment accordingly for the defendants.

The plaintiffs appealed.

*H. Newbolt, K.C.*, and *H. J. Turrell*, for the appellants. The judgment recovered in the previous action against Salbstein Brothers cannot be a bar to this action against these defendants. There is no estoppel, and the matter is not res judicata, because the parties are not the same; the previous action was res inter alios acta. There can be no question of election, because there is no suggestion that there was any relation of principal and agent between the defendants in the first action and the defendants in this action. The cause of action is not the same, and therefore the cause of action in this case has not been merged in the judgment. It is not said that there was any joint contract; and the cause of action for the debt alleged to be due from Salbstein Brothers is not the same cause of action as that for the debt claimed from these defendants, though the goods may be the same. [They referred to *Wegg-Prosser* v. *Evans* (1) and *Langmead* v. *Maple*. (2)]

(1) [1895] 1 Q. B. 108. (2) (1865) 18 C. B. (N.S.) 255.

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*R. V. Bankes, K.C.*, and *Rowand Harker*, for the respondents. If A. has a cause of action for a debt due for the price of goods sold and sues B. for that debt and recovers judgment, he cannot bring a subsequent action against C. for the price of the same goods. The debt and cause of action are the same and the debt has been merged in the judgment and is gone. It is not a matter of estoppel, or of res judicata, or of election; but the principle is that a man cannot recover judgment twice for the same cause of action. Here the debt sued for in each action was in respect of the price of the same goods, and therefore the cause of action must be the same in each case. In *King* v. *Hoare* (1) Parke B. said: "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action . . . . the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many." The statement of the law by Field J. in *Cambefort & Co.* v. *Chapman* (2), although the decision was overruled in *Wegg-Prosser* v. *Evans* (3), was not affected; he said: "The principle of the maxim nemo debet bis vexari applies not only to the case of one individual being sued twice for the same cause of action, but also to the case of a person suing twice on the same contract." The same principle is stated by Lord Cairns in *Kendall* v. *Hamilton* (4), where he said: "They exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person"; and by Mathew L.J. in *Morel Brothers & Co.* v. *Earl of Westmorland* (5) when he said: "Assuming that it is, nevertheless, open to the plaintiffs now to set up an alternative claim based upon a sole liability on the part of the husband, I think that, on that assumption, in point of principle the case stands

(1) (1844) 13 M. & W. 494, 504.
(2) (1887) 19 Q. B. D. 229, 232.
(3) [1895] 1 Q. B. 108.
(4) (1879) 4 App. Cas. 504, 515.
(5) [1903] 1 K. B. 64, 79; [1904] A. C. 11.

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on the same basis as if an action for the price of the goods supplied had first been brought against the wife alone, and judgment recovered in that action against her, and then, that judgment being unsatisfied, a second action had been brought against the husband for the price of the same goods. The decisions shew that such an action cannot be maintained." All those passages apply exactly to the present case and show that this action cannot be maintained.

*Newbolt, K.C.*, was not called upon to reply.

Feb. 18. LUSH J. This is an appeal by the plaintiffs from the judgment of the deputy judge at the City of London Court. The facts are few and not in dispute. The plaintiffs brought this action against the two defendants for the price of goods sold. At the close of the plaintiffs' case the defendants submitted that there was no case to go to the jury and the judge adopted that view and gave judgment for the defendants. The plaintiffs had previously brought an action against an alleged firm called Salbstein Brothers and recovered judgment, no doubt in respect of these very goods. That judgment remained wholly unsatisfied.

The contention for the defendants before the deputy judge and before us was that the mere fact that these plaintiffs had recovered a judgment against some person other than these defendants of itself barred and extinguished this cause of action; that the doctrine transit in rem judicatam applies not only as between the plaintiff and the defendant or any persons who were joint contractors with the defendant in the contract sued on, but applies also although the person ultimately sued had no relation to the person against whom the prior judgment was recovered and was not a party with him to any joint contract and was not his agent or principal. That is a very wide and important proposition, but in my opinion it is not well founded. The doctrine of transit in rem judicatam is that if judgment has been recovered upon a cause of action, then any right in respect of that same cause of action merges in the judgment already recovered; but it must be the same cause of action. It does not mean that if a judgment is recovered in respect of the same goods against somebody the cause of action against some other person really liable is gone. The principle of the decisions in *King* v.

*Hoare* (1) and *Kendall* v. *Hamilton* (2) is that if a party to a contract sues one individual upon a contract and recovers judgment against him, then if it turns out that that contract was a joint contract to which other persons than the defendant in the first action were parties, the judgment recovered against one party bars the right of action on that same contract against the other parties to it. The contract being one contract made with several persons, judgment against one of them operates to extinguish the cause of action on that contract against all the parties to it because it was one contract and one contract only. There is, however, no foundation whatever for the contention that because A. recovers a judgment against B., who in truth never was a party to the contract at all, he cannot afterwards recover judgment on that contract against C., who was the real contracting party. Where judgment is recovered on a simple contract, that contract no doubt merges in the contract of higher degree which is evidenced by the judgment and which is a contract of record. But there is no ground for saying that a contract between A. and B., although it is a contract of record, merges a contract between A. and Z. They are two different contracts and therefore give rise to two different causes of action. For these reasons I think that we cannot extend the principle laid down in *King* v. *Hoare* (1) and *Kendall* v. *Hamilton* (2) to a case like the present, which bears no real resemblance to it.

Passages have been cited from the judgments in four cases in support of the defendants' contention—*King* v. *Hoare* (1), *Kendall* v. *Hamilton* (2), *Cambefort & Co.* v. *Chapman* (3), and *Morel Brothers & Co.* v. *Earl of Westmorland.* (4) No doubt, if one takes the passages cited apart from the context and apart from the facts of those cases, they do appear to afford some colour for saying that the proposition laid down was as wide as that for which the defendants contend. But if one looks at the judgments and bears in mind what the facts were with regard to which the judgments were delivered, it seems to be clear that the learned Lords in *Kendall* v. *Hamilton* (2) and the learned judges in *Morel Brothers & Co.* v. *Earl of Westmorland* (4) were only speaking of judgments recovered

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) 19 Q. B. D. 229.
(4) [1903] 1 K. B. 64; [1904] A. C. 11.

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against persons who were parties to the same contract in respect of which the second action was brought. If the defendants are right, there never was any necessity for the learning that one finds in the judgments in *Kendall* v. *Hamilton* (1), for example, because, if it is true to say that a judgment obtained by A. against B. is a bar to a subsequent action by A. against C. in respect of the same goods, it was wholly unnecessary to discuss the question whether a judgment recovered against one of several joint contractors bars a subsequent action against another joint contractor.

For these reasons I think that this action was maintainable, and that the facts must be investigated. The appeal must be allowed.

ATKIN J. The proposition which it is sought to maintain is that if A. obtains a judgment against B. he cannot afterwards sue C. for the same cause of action. Now it appears to me that the fallacy in seeking to apply that proposition to the present case lurks in the words "the same cause of action." The cause of action for debt is the promise of the defendant to pay the price of the goods sold and delivered. If A. alleges that he has sold goods to B. and B. has promised to pay him and he recovers judgment, and then afterwards says that he has made a mistake and it was not B. to whom he delivered the goods and who promised to pay him, but was C., he is not suing C. upon the same cause of action; he is suing on a different cause of action, namely, C.'s promise to pay him, whereas before he had sued B. on B.'s promise to pay him. It is an action brought in respect of the same subject-matter, but that does not appear to me to make it the same cause of action, and I think that that really would account for what I conceive to be the fact, that in law it is not a defence to say that the plaintiff has already sued somebody else in respect of the goods and that, though he may have made a mistake, he cannot sue the proper person. I think that the estoppel which is founded upon a judgment is purely and simply an estoppel between the parties, and I am struck with the fact that in the notes to the *Duchess of Kingston's Case* in Smith's Leading Cases (2) I find no trace at all of this doctrine that is put before us—certainly before me—for the first time. Those notes in dealing with estoppel divide estoppel by judgments into two kinds,

(1) 4 App. Cas. 504. (2) 2 Sm. L. C., 12th ed., pp. 754, 767.

judgments in rem and judgments in personam, or more accurately inter partes, because there may be a judgment in personam as to the status of a particular person which is similar to a judgment in rem. Then, proceeding to deal with this estoppel they say (1): "Next with regard to the judgment of a Court of record inter partes. The great maxim which governs its effect is,—Res inter alios acta alteri nocere non debet. The rule laid down in the judgment of De Grey C.J. in the *Duchess of Kingston's Case*, ante, p. 754, is that the judgment is conclusive between the same parties. In B. N. P. 232, the rule, and the reason for it, are stated to be that 'the verdict ought to be between the same parties, because otherwise a man might be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that any one should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert.' To the same effect is Com. Dig. tit. Estoppel; Co. Litt. 352; and *Gaunt* v. *Wainman*, 3 B. N. C. 69, where Tindal C.J. said: 'According to Co. Litt. 352a, "every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel."' It would be hard, indeed, if it were otherwise." I do not think I need refer further to that point, but certainly I should have expected to find in those very learned notes some trace of this doctrine as it has been put before us, if it existed. I am satisfied that no such doctrine exists. The principle of the rule has been stated by my learned brother, and I entirely agree with what he has said in that respect. I think this nonsuit was wrong and that the action must go back to be tried and determined between the parties.

*Appeal allowed.*

J. H. W.

The defendants appealed.

March 20. *F. Newbolt, K.C.* (*H. J. Turrell* with him), for the plaintiffs. There is a preliminary objection to the hearing of this appeal. It is a final appeal, and is wrongly entered in the interlocutory list. The test is what is the nature of the judgment or

(1) 2 Sm. L. C., 12th ed., p. 780.

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order originally appealed from, and in the present case that was undoubtedly a final judgment in favour of the defendants. It is submitted that the present appeal to the Court of Appeal from the Divisional Court is merely a rehearing of an appeal from a final order. [He cited *Shubrook* v. *Tufnell* (1); *Bozson* v. *Altrincham Urban Council.* (2)]

*R. V. Bankes, K.C.*, and *J. Flowers* were not called upon.

SWINFEN EADY L.J. The preliminary point has been taken that the appeal has been wrongly entered in the interlocutory list because it is a final appeal. The action was brought in the City of London Court, where the deputy judge gave judgment for the defendants; the plaintiffs appealed to the Divisional Court, who discharged the judgment and ordered a new trial; the present appeal is from that order of the Divisional Court. The question turns on the proper construction of Order LVIII., r. 15, which provides that "no appeal to the Court of Appeal from an interlocutory order . . . . shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks." We have to determine whether the order under appeal is interlocutory or not. In my opinion it is an interlocutory order; it does not finally dispose of the matters in litigation or the rights of the parties. No order directing a new trial can in its nature be an order finally determining the rights of the parties. Apart from authority I should have no difficulty in deciding that this was an interlocutory order. How do the authorities stand? *Bozson* v. *Altrincham Urban Council* (2) was an appeal from an order of Wills J., who held that there was no binding contract between the parties, and made an order dismissing the action, upon which judgment was entered for the defendants. Manifestly the appeal to the Court of Appeal was from a final judgment, which, unless reversed on appeal, finally decided the rights of the parties. The Earl of Halsbury L.C. said: "I think the order appealed from was a final order, and the appeal is therefore brought within the prescribed time." Lord Alverstone C.J. said: "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think

(1) (1882) 9 Q. B. D. 621, 623. (2) [1903] 1 K. B. 547, 548.

it ought to be treated as a final order ; but if it does not, it is then, in my opinion, an interlocutory order." Applying the test there so clearly laid down, the order in the present case is an interlocutory order. In my opinion this settles the case. We have to look to the order from which the appeal was brought. Two earlier cases have been cited to us, which are somewhat difficult to reconcile with *Bozson* v. *Altrincham Urban Council.* (1) In *Shubrook* v. *Tufnell* (2) the plaintiff having brought an action to recover structural damage caused by the making of a drain through adjoining land, the action was referred to arbitration, and the arbitrator stated a case which raised a question of law only. If the defendant won on the special case, the decision would finally dispose of the matter ; if the plaintiff won, it would not, as the case would have to go back to the arbitrator. In the Divisional Court the decision was in favour of the plaintiff, that the case should go back to the arbitrator. On appeal to the Court of Appeal the question arose whether the appeal was final or not. Jessel M.R. in his judgment went on this footing : he drew attention to the case of *Collins* v. *Paddington Vestry* (3) and said : " The Court only held that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory." He went on to add : " Here if we differ from the Court below, final judgment has to be entered for the defendant, and there is an end of the action." The effect of that decision is this : that if the result of the order appealed from would be final judgment for either party, it is a final order. Then there is *Salaman* v. *Warner* (4), in which it was held that a final order was one made on such an application or proceeding that, for whichever side the decision might be given, it would, if it stood, finally determine the matter in litigation. Neither decision seems quite consistent with that in *Bozson* v. *Altrincham Urban Council* (1), which puts the matter on the true foundation that what must be looked at is the order under appeal. In the present case the order is clearly an interlocutory order, and the appeal is properly in the interlocutory list.

(1) [1903] 1 K. B. 547.
(2) 9 Q. B. D. 621, 623.
(3) (1880) 5 Q. B. D. 368.
(4) [1891] 1 Q. B. 734.

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PICKFORD L.J. I agree. It was decided in *Shubrook* v. *Tufnell* (1) that if the decision of the Court of Appeal was a final decision it made the order under appeal a final order. But *Salaman* v. *Warner* (2) decided that it was only final if it put an end to the litigation, whichever way it was decided. In *Bozson* v. *Altrincham Urban Council* (3) the Court of Appeal declined to follow *Salaman* v. *Warner* (2), and said they preferred *Shubrook* v. *Tufnell* (4), but although Lord Halsbury L.C. said he preferred it I do not think he altogether followed it. He followed it so far as to say that *Salaman* v. *Warner* (2) was not right in saying that an order was final if it would, whichever side won, finally determine the litigation; he further said that the thing to be looked at was the order appealed from. In the present case the order appealed from does not put a final end to the action, and this is an appeal from an interlocutory, and not from a final, order.

BANKES L.J. I am of the same opinion, and I have nothing to add.

The appeal then proceeded.

*R. V. Bankes, K.C.*, and *J. Flowers*, for the defendants, in addition to the cases cited in the Court below, referred to *Buckland* v. *Johnson* (5), *Brinsmead* v. *Harrison* (6), and *Hirachand Punamchand* v. *Temple*. (7)

*F. Newbolt, K.C.*, and *H. J. Turrell*, for the plaintiffs, cited in addition *Hammond* v. *Schofield* (8), *Blyth* v. *Fladgate* (9), and *Lechmere* v. *Fletcher*. (10)

In all other respects the arguments were the same as those in the Divisional Court.

March 21. SWINFEN EADY L.J. This is an appeal of the defendants from a decision of the Divisional Court discharging a judgment in favour of the defendants of the deputy judge of the City of London

(1) 9 Q. B. D. 621.
(2) [1891] 1 Q. B. 734.
(3) [1903] 1 K. B. 547.
(4) 9 Q. B. D. 621, 623.
(5) (1854) 15 C. B. 145.
(6) (1871) L. R. 6 C. P. 584; (1872) 7 C. P. 547.
(7) [1911] 2 K. B. 330.
(8) [1891] 1 Q. B. 453.
(9) [1891] 1 Ch. 337, 353.
(10) (1833) 1 Cr. & M. 623.

Court and directing a new trial. The action was originally brought by the plaintiffs in the High Court, but was remitted to the City of London Court. In the view which the deputy judge took the plaintiffs had no case, and he gave judgment for the defendants. The plaintiffs appealed to the Divisional Court against that judgment, who set it aside and ordered a new trial. The defendants appeal to us and contend that the Divisional Court was wrong and that judgment was properly entered in the City of London Court in favour of the defendants. The plaintiffs sue the defendant Harry Salbstein and Edith, his wife, and the case they tried to make is that the defendants are liable, or one of them is liable, for a sum of 20*l.* 16*s.* 2*d.*, being the balance which the plaintiffs claim to be due to them upon a contract for the sale of lemons, which was broken by the defendants; they allege that 138 boxes of lemons were offered for sale by auction and that they were knocked down to the defendant Harry Salbstein, but that the purchase was not completed by him, thus resulting in a claim for 20*l.* 16*s.* 2*d.* in respect of goods bargained and sold. The person for whom the goods were in fact purchased is in dispute. The deputy judge held that the plaintiffs had no case upon these grounds. There had been a former action for the same sum of money, in which the plaintiffs were the same, but the defendants were Salbstein Brothers. The writ was issued against the firm by that description and was served on Julius Salbstein, who was alleged to be a partner in the firm; no appearance was entered, and judgment was signed by the plaintiffs in default. Execution was issued and certain goods were seized under a writ of fi. fa., a claim was made to the goods by Joseph Salbstein, interpleader proceedings resulted, and Joseph Salbstein maintained his claim and recovered damages for trespass. Down to that point the judgment against Salbstein Brothers remained unsatisfied; it is indeed not agreed whether there was such a firm as Salbstein Brothers at all.

The defence relied upon in the City of London Court was that the plaintiffs had already recovered judgment against some persons other than the defendants and that any cause of action against the defendants was thereby extinguished. When, however, defendants rely for defence upon a judgment in some former action, the burden is upon them to show that the judgment was obtained upon grounds or under circumstances which afford them a defence to the

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subsequent action : *Phillips* v. *Ward*. (1) Thus, it is not shown that there was any such firm as Salbstein Brothers in existence when the alleged debt was contracted, or when the writ in the former action was issued, or when the judgment against an alleged firm so sued was signed in default of appearance. It is alleged by the plaintiffs that there were affidavits used as admissions before the deputy judge which showed that no such firm was in existence. The defendants contend that the affidavits were not put in as admissions or were not referred to in the county court. It will be sufficient to say that, the burden of proof being upon the defendants, who relied upon the judgment in the former proceedings as a defence, they did not adduce any evidence on the point.

If the defendant Harry Salbstein had shown that the firm of Salbstein Brothers was an existing firm at the material times and that he was a partner in that firm, and that any obligation was only a joint obligation of the partners in the firm, it would have been a complete defence in this action. Again, if it were shown that the plaintiffs, having a right to elect which of two parties to sue (i.e., principal or agent), had sued one to judgment, an action against the other party would be thereby barred. Again, if the defendants, or either of them, were or was jointly liable with a real firm of Salbstein Brothers, as the firm only had been sued in the former action, this would have constituted a good defence to the present action. *King* v. *Hoare* (2) decided that a judgment recovered against one of two *joint* debtors is a bar to an action against the other. Parke B., in delivering the judgment of the Court of Exchequer, said (3) : " The matters of form being disposed of, the question is reduced to one of substance : whether a judgment recovered against one of two joint contractors is a bar to an action against another. It is remarkable that this question should never have been actually decided in the Courts of this country. There have been, apparently, conflicting dicta upon it. Lord Tenterden, in the case of *Watters* v. *Smith* (4), is reported to have said, that a mere judgment against one would not be a defence for another. My brother Maule stated, in that of *Bell* v. *Banks* (5), that a security by one of two joint debtors would

(1) (1863) 2 H. & C. 717.
(2) 13 M. & W. 494.
(3) 13 M. & W. 503.
(4) (1831) 2 B. & Ad. 889, 892.
(5) (1841) 3 Man. & G. 258, 267.

merge the remedy against both. In the case of *Lechmere* v. *Fletcher* (1) Bayley B. strongly intimates the opinion of the Court of Exchequer, that the judgment against one was a bar for both of two joint debtors; though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle, and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the plea is good. If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher." This case was approved and adopted by the House of Lords in *Kendall* v. *Hamilton*. (2) It was there pointed out that the result did not depend upon any doctrine of election, which would imply that the party electing was aware when he made his election of two courses being open to him. The principle on which the rule is founded is the right of persons jointly liable to pay a debt to insist on being sued together: per Lord Cairns. (3) This was the principle contended for by counsel when arguing *King* v. *Hoare*. (4) "The principle is, that a person who enters into a joint contract has a right to say he will not be sued but with his co-contractor, and the plaintiff by his act cannot deprive him of that right." Where, however, the obligation binds two or more persons severally, a judgment against one is no bar to an action against another.

In *Lechmere* v. *Fletcher* (5) the law is thus stated by Bayley B.: "There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied: but

(1) 1 Cr. & M. 623, 634.
(2) 4 App. Cas. 504.
(3) 4 App. Cas. 515.
(4) 13 M. & W. 501.
(5) 1 Cr. & M. 623, 635.

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so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle, that where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other"; and that statement of the law was recognized by Parke B. in *King* v. *Hoare*. (1)

If, therefore, where the obligations are several, a judgment in an action against one person is no bar to an action against another, I see no ground upon which it can be maintained that an action brought in error against a fictitious person or against a person not under any liability is a bar to an action against the person alleged to be really liable. The cause of action is not the same.

Mr. Bankes relied upon the decision of the Court of Common Pleas in *Buckland* v. *Johnson* (2), and particularly upon the following passage in the judgment of Maule J.: "The circumstance of the present defendant's having been a joint converter, or a stranger, makes, I think, no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone; his claim was satisfied as against all the world. He was in fact in the position of a person whose goods had never been converted at all." This passage was relied upon in support of the proposition that if a person, having sold goods to A., afterwards sues a stranger for their price, he cannot recover against A.; but the case does not decide anything of the kind. If the facts of that case are looked at, it appears that the defendant and his son jointly converted the goods of the plaintiff, and that the defendant received the money for them; the plaintiff, having the election to sue in trover or to affirm the transaction and sue for money had and received, elected to sue the son for conversion, and it was held that, having once elected to sue the son in trover and having obtained judgment against him, he could not turn round and sue the father for money had and received. The case is no authority for the proposition for which it is cited. The result is that the judgment of the Divisional Court was right and must be affirmed, and there must be a new trial of the action.

(1) 13 M. & W. 494. (2) 15 C. B. 145, 166.

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PICKFORD L.J. I am of the same opinion. The point taken on behalf of the defendants is this—that if a plaintiff has obtained judgment for the price of goods against anybody who turns out not to be liable the judgment operates as a bar to his suing the person who really bought the goods. The point decided by the county court judge went a little further than this; it is pointed out by counsel that there was no evidence whether the firm of Salbstein Brothers was an existing firm or not, they being the defendants against whom judgment was obtained in the first instance, and the judge decided that, notwithstanding this objection, the judgment was a bar to the action against the defendants. I do not think that that decision can possibly be right, for a judgment against a so-called firm which has no existence cannot possibly be a bar to an action against the person or persons really liable. But, assuming that there was an existing firm of Salbstein Brothers and that judgment was regularly obtained against that firm, such judgment can be no bar to an action against the party really liable, unless it can be shown that he was a partner or was in some other way jointly liable with the firm. If Salbstein Brothers and the defendants are either of them liable, they must be liable either jointly, or severally, or alternatively. If they are jointly liable, there is no question that a judgment against one is a bar to an action against the other; if they are severally liable, it is equally clear that it is not a bar, for the two actions do not arise out of the same cause of action. If the liability is joint, there is only one cause of action, and that becomes merged in the judgment; if the liability is several, there are two causes of action, and there is no merger by reason of the judgment. Here it is possible that Salbstein Brothers are not liable and that the defendants are; the case must therefore fall under the principle of several liability. If the defendants contracted to pay for the goods and Salbstein Brothers did not, there cannot be anything in the judgment against Salbstein Brothers to bar an action against the defendants. I think, therefore, that the point that the judgment against Salbstein Brothers is a bar to the present action is not a good point. Another point has been taken—that at any rate the plaintiffs elected to sue Salbstein Brothers, who were the principals of the defendants, and that, having so elected, they cannot now sue the agents. If the facts supported it, that would be a good point, but we have no evidence as to it one

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way or the other. If there was no existing firm of Salbstein Brothers, they could not be any one's principals. I am of opinion that the order of the Divisional Court was the proper order, and that there must be a new trial.

BANKES L.J. read the following judgment:—I agree. In the county court the defendants relied upon the fact that the plaintiffs had recovered judgment against Salbstein Brothers for the same sum of money for which they are being sued in this action. They did not attempt to set up either that the debt was a joint debt of themselves and Salbstein Brothers or that they acted as agents in the matter for Salbstein Brothers. They were content to rest their defence upon the mere fact that judgment had been recovered, and they rested it upon the ground of the maxim "transit in rem judicatam." The meaning of that maxim has been expounded by Parke B. in *King* v. *Hoare*. (1)

The case has been argued for the defendants upon the assumption that, in considering what any particular cause of action is which is changed into matter of record, it is sufficient to consider the nature and amount of the plaintiff's claim only without any reference to the nature of the obligation on the part of the person or persons against whom it is sought to establish the claim. In my opinion this contention is not well founded. A definition of "cause of action" is given by Brett J. in *Cooke* v. *Gill* (2), where he says: "'Cause of action' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse." Some tests of whether a cause of action is the same in any two actions are referred to by Bowen L.J. in *Brunsden* v. *Humphrey*. (3) As illustrations of what I have said I may refer to the following instances. A. lends money to B. and C. jointly. Here there is only one cause of action; this is clear: see *King* v. *Hoare* (4); *In re Hodgson* (5), per Bowen L.J. So also where A. contracts with B. acting as agent for C.; here also there is only one cause of action. In either case A. can only recover one judgment because he has only

(1) 13 M. & W. 494, 504.
(2) (1873) L. R. 8 C. P. 107, 116.
(3) (1884) 14 Q. B. D. 141, 147.
(4) 13 M. & W. 494, 505.
(5) (1885) 31 Ch. D. 177, 188.

one cause of action. But if A. lends money to B. and C. for which they are jointly and severally liable, there are two causes of action. A. can recover judgment for the debt against B., and, if it is not satisfied, he can recover judgment for the same sum of money against C. The rule which enables him to do this appears to me to be the rule that the judgment against B. is no estoppel as against C. Consequently the plaintiff is entitled to prove what the facts really are, namely, that he has a separate and distinct cause of action against C. arising out of the several contract. If this test is applied to the present case, what ground is there for saying that the plaintiffs are not entitled to go into the facts and to show, if they can, that they have a cause of action against the defendants or either of them separate and distinct from any cause of action they may have had against Salbstein Brothers? One way in which the plaintiffs could do this would be by showing that Salbstein Brothers were a non-existent firm, or that, although when they issued the writ and recovered judgment by default they were under the impression that they had a right of action against Salbstein Brothers, they had since discovered that they were mistaken and that the defendants were their real debtors and they had no real cause of action against Salbstein Brothers. Apart, therefore, altogether from the proposition that the onus lies upon the defendants of establishing some ground for saying that the cause of action relied on has merged in a judgment, there is, in my opinion, no ground for suggesting that it is not open to the present plaintiffs to prove, if they can, that the defendants are the persons really liable to them for this debt.

It is said that, if this is the rule of law, a person may recover a number of judgments against different persons for the same sum of money. I see no great objection to this, having regard to the fact that a plaintiff cannot receive the amount claimed more than once; and the objection is less, in my opinion, than the objection that a defendant should escape a just liability upon the ground that the plaintiff made a mistake as to the proper person to sue. We have been referred to a number of dicta of learned judges, but when read in reference to the facts of the particular cases in which those dicta occur nothing I have said is in my opinion in conflict with them.

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The deputy judge decided the case upon the question of law submitted to him. I think that the case must go back to be tried on the facts.

*Appeal dismissed.*

Solicitors for plaintiffs: *Edgar & Co.*

Solicitor for defendants: *W. J. Wenham, for Cushman & Cunningham, Brighton.*

W. J. B.

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[IN THE COURT OF APPEAL.]

## BECKER, GRAY & CO. *v.* LONDON ASSURANCE CORPORATION.

[1914 B. 4220.]

*Insurance (Marine)—Constructive Total Loss—"Restraint of Princes"—Declaration of War—"Men-of-War"—Peril of Capture—Ship putting into Neutral Port to avoid Risk of Capture—British Goods on German Ship—Loss of Adventure—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60, 62.

The plaintiffs shipped goods on board a German ship for carriage from Calcutta to Hamburg, and insured them on that voyage with the defendants against the usual perils, including men-of-war, enemies, and restraint of princes. While the goods were at sea war broke out between Great Britain and Germany, and the master on being informed of that fact put into a neutral port in order to avoid the risk of capture by hostile cruisers, and with the intention of suspending the further prosecution of the voyage until after the termination of the war, and the vogage was thereupon abandoned. The commercial venture insured being thereby destroyed, the plaintiffs gave notice of abandonment to the defendants and claimed as for a total loss. At the time that the ship put into the neutral port she had not been chased by any hostile cruiser, nor had she even sighted one, but if she had continued her voyage the peril of capture would have been great:—

*Held*—(1.) that the frustration of the venture was caused, not by the declaration of war rendering the further prosecution of the venture illegal, but by the act of the captain of the German ship putting into a neutral port and abandoning the voyage, and that therefore "restraint of princes" was not the proximate cause of the loss; and (2.) that, although to constitute a loss by capture actual capture was not necessary, the termination of the voyage by putting

into a neutral port to avoid the risk of capture before the ship had gone into the zone of peril, and consequently before the peril had begun to operate, was a loss which could not be regarded as proximately caused by "men-of-war"; and that therefore the plaintiffs were not entitled to recover.

*British and Foreign Marine Insurance Co.* v. *Sanday & Co.* [1916] 1 A. C. 650 distinguished.

Judgment of Bailhache J. [1915] 3 K. B. 410 affirmed.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury; reported [1915] 3 K. B. 410.

The following statement of facts is taken from the judgment of Swinfen Eady L.J., with certain additions as indicated :—

"The plaintiffs are British merchants, and in June, 1914, they sold in Calcutta to German buyers 500 bales of jute for shipment to Hamburg, upon the terms that the property was not to pass until arrival of the goods at port of destination and payment of the price. (1) Part of this quantity, namely, 218 bales, was shipped on board a general ship, the German steamship *Kattenturm*, for carriage from Calcutta to Hamburg, and a policy of marine insurance dated July 28 was effected with the defendants. The clause 'warranted free from capture, seizure, &c.,' is struck out, in consideration of an additional premium. The perils which the insurers are contented to bear include, 'men-of-war . . . . enemies . . . . takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition or quality soever.'

"The ship sailed from Calcutta at the end of June, or early in July. She was at Malta, we are told, on August 1, and left about August 2 or 3. On August 4 at 11 P.M. a state of war arose between this country and Germany. On August 5 or 6 the *Kattenturm* put into Messina, then a neutral port. At some later date, which is not material, she left Messina and went to Syracuse. The master put into Messina because he thought it was a prudent thing to do having regard to the state of war between Germany and the Allies. His

(1) By the contract, which was in the form issued by the London Jute Association, June, 1914, the buyers were to pay cash in London against documents within twenty-four hours of the official arrival of the steamer at port of destination, final settlement to be made on the average landed weights to be ascertained by the landing and weighing at port of destination at seller's expense of 10 per cent. of the bales.

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was a German ship, and the French and English fleets were watching the seas.

"By agreement between the parties a letter from the Admiralty has been put in, and is to be treated as evidence in this case. The letter is as follows: 'I am commanded by my Lords Commissioners of the Admiralty to inform you that any German steamer proceeding on or after the 5th August last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or Allied warships when outside neutral territorial waters.' The judge said that he had no doubt that the master, from his point of view, did a very prudent and the most prudent thing that he could do when he put into Messina. The judge further found that the master had no thought of further prosecuting the voyage until the termination of the war; that the period of the war was certain to be so long and indefinite that the voyage must be taken to have been abandoned, and was for all practical purposes abandoned, when the master put into Messina. This is the judge's finding of fact, with which I agree. On September 1 the plaintiffs gave notice of abandonment to the defendants, and claimed that the goods were a constructive total loss" (the notice stating that the goods were a constructive total loss "through consequence of hostilities," and that they were on board the *Kattenturm* "stopped at Messina"), "but the defendants declined to accept the abandonment.

"On October 28, 1914, a decree was made by the Italian Government prohibiting the exportation of raw jute; this was published in the *Official Gazette* of November 4, 1914, and came into operation on November 5, 1914. After this last-mentioned date the jute could not be exported from Italy. On November 11, 1914, a written communication was made (through the British Consul at Rotterdam and with the sanction of the Board of Trade) to the Hansa Company at Bremen (which owns the ships of the Hansa Line, to which the *Kattenturm* belonged) in order to ascertain whether the company was willing to deliver up such portions of the cargo of the steamship *Kattenturm* as belonged to the plaintiffs (amongst others), and, if so, upon what terms. The company answered on November 20 that the German Government, by way of retaliation against the measures taken by the British Government, had issued a prohibition against delivering goods to British subjects. This was communicated to the

defendants, and on December 16, 1914, a further notice of abandonment was given to them" (the notice stating that, in reply to an inquiry as to the terms on which the owners of the steamship *Kattenturm* would deliver the goods to British subjects, they definitely stated on November 20 last that the German Government had prohibited any such delivery to British subjects), "and on December 17, 1914, the writ herein was issued. Subsequently further steps were taken to obtain the cargo and dispose of it in Italy, but these steps were taken by arrangement for the benefit of whomsoever it might concern, and were not to affect the rights of the parties."

Bailhache J. held that the termination of the voyage by putting into a neutral port to avoid the risk of capture before the peril had begun to operate was not a loss proximately caused by a peril insured against, and that therefore the plaintiffs could not recover. The plaintiffs appealed.

*Sir John Simon, K.C.*, and *Leck, K.C.* (*Butler Aspinall, K.C.*, and *R. A. Wright* with them), for the plaintiffs. First, there has been a constructive total loss by the frustration of the adventure owing to a peril insured against, namely, restraint of princes, the peril being the proximate cause of the loss: *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1) The subject-matter insured was the adventure of sending British goods in a German ship from Calcutta under a contract of affreightment for delivery to consignees at Hamburg. The British declaration of war against Germany on August 4 automatically put an end to and hopelessly frustrated that adventure, the assured being British subjects and as such being forbidden to continue the adventure. On the outbreak of war the contract of affreightment with the German shipowner was dissolved: *Esposito* v. *Bowden* (2); *Karberg & Co.* v. *Blythe, Green & Co.* (3) The declaration of war therefore operated as a "restraint of princes": *Sanday's Case.* (1) For this purpose the fact that in *Sanday's Case* (1) the ship was a British ship and in the present case it was a German ship is not material. In both cases the goods were British-owned goods. The adventure destroyed was the adventure in respect of the goods, not in respect of the ship. The plaintiffs lost all control over the

(1) [1916] 1 A. C. 650.
(2) (1857) 7 E. & B. 763, 783.
(3) [1915] 2 K. B. 379, 389; [1916] 1 K. B. 495, 505.

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goods for an indefinite time, and the adventure was thereby altogether frustrated: *Rodocanachi* v. *Elliott*. (1) Even if the *Kattenturm* had proceeded on her voyage and had arrived at Hamburg the adventure would have been destroyed, because it would have been illegal to deal with the goods there after the declaration of war. The subject-matter insured was therefore reasonably abandoned on account of its actual total loss appearing to be unavoidable: s. 60 of the Marine Insurance Act, 1906. [Arnould on Marine Insurance, 9th ed., vol. 2, s. 1142, was also referred to.]

Secondly, the *Kattenturm* was in peril of capture when she put into Messina. The letter from the Admiralty clearly shows that. Whether the loss is due to peril of capture or merely to fear of or avoidance of the peril of capture is a question of degree in each case. Actual capture is not necessary: *Butler* v. *Wildman*. (2) In the present case the facts show that the ship was in the zone of peril, and the risk of capture by "men-of-war" had attached. In *Hadkinson* v. *Robinson* (3) the master of the vessel avoided the port of destination because if the vessel went there she would be confiscated. In that case the vessel never was in peril of capture. *Lubbock* v. *Rowcroft* (4) was a similar case. Those cases, moreover, were decided at a time when sailing ships might more easily avoid capture than vessels at the present day can since wireless telegraphy came into existence. In *Kacianoff* v. *China Traders Insurance Co.* (5) the vessel with the insured goods on board never left the port from which she was to sail, and therefore the risk of capture had not begun to operate. In *Geipel* v. *Smith* (6), which was a charter-party case, the defendants were held to be excused from loading by reason of a restraint of princes because the port to which the ship was to proceed was blockaded; and that decision was applied to a policy of insurance in *Rodocanachi* v. *Elliott*. (7) The law is correctly stated in Phillips on Insurance, 3rd ed., vol. i., s. 1115, p. 657, where it is said that "where, after the risk has begun, the voyage is inevitably defeated . . . . by a hostile fleet being in the way rendering the proceeding upon it utterly impracticable, or capture or seizure so

(1) (1873) L. R. 8 C. P. 649, 664; in Ex. Ch. (1874) L. R. 9 C. P. 518, 521.
(2) (1820) 3 B. & A. 398.
(3) (1803) 3 Bos. & P. 388.
(4) (1803) 5 Esp. 50.
(5) [1913] 3 K. B. 407; [1914] 3 K. B. 1121.
(6) (1872) L. R. 7 Q. B. 404.
(7) L. R. 8 C. P. 665.

extremely certain that proceeding would be inexcusable . . . . an assured on the cargo has a right to abandon." Sect. 60 of the Marine Insurance Act, 1906, therefore applied. [*The Knight of St. Michael* (1) was also referred to.]

Lastly, the goods were in an enemy ship and in the possession of an enemy master, who put into a neutral port and under the orders of the German Government refused to deliver up the goods to the plaintiffs, and from that point of view there was a loss of the goods by reason of a peril insured against, namely, " enemies," or perhaps " restraint of princes," the prince being an enemy prince. The adventure was thereby frustrated.

*Sir Robert Finlay, K.C.*, and *T. Mathew* (*Leslie Scott, K.C.*, and *Roche, K.C.*, with them), for the defendants. With regard to the first point taken by the plaintiffs, the facts as found by Bailhache J. do not support it. The declaration of war was not the proximate cause of the loss. The act of the German captain in putting into Messina and staying there was the proximate cause of the loss, and not the declaration of war ; and the plaintiffs on September 1 gave notice of abandonment on that ground. The German captain did not put into Messina owing to any illegality in continuing the voyage and bringing the goods to Hamburg. The illegality, therefore, of continuing the adventure caused by the declaration of war was not the cause of the loss. In *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (2) the ships were British ships, and on the declaration of war the ships put into a British port instead of proceeding on the contemplated voyage to Hamburg. In that case the illegality was acted upon and caused the loss. In the present case the adventure was frustrated by the act of the German captain in putting into Messina and not by the illegality. Moreover, the plaintiffs did not purport to abandon the adventure on the ground of illegality. Notice of abandonment was not given until September 1, whereas if the plaintiffs had acted on the illegality they would have given notice of abandonment immediately after August 4. They did not act on the illegality and cannot recover.

With regard to the second point, the case is governed by the line of decisions from *Hadkinson* v. *Robinson* (3) to *Kacianoff* v. *China*

(1) [1898] P. 30. (2) [1916] 1 A. C. 650.
(3) 3 Bos. & P. 388.

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*Traders Insurance Co.* (1) The captain of the *Kattenturm* put into Messina to avoid any danger from the peril, namely, capture by a man-of-war, and that is not the same thing as incurring loss by the peril. In Phillips on Insurance, 3rd ed., s. 1115, an endeavour is made to throw doubt on the decisions in *Hadkinson* v. *Robinson* (2) and *Lubbock* v. *Rowcroft* (3), but those decisions have been approved in subsequent English cases—*Kacianoff* v. *China Traders Insurance Co.* (4) and *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (5)—and by the Supreme Court of the United States in *Smith* v. *Universal Insurance Co.* (6) It is a question of fact in each case on which side of the line the case falls, and Bailhache J. was right in saying that in this case the peril had not begun to operate. The adventure was not frustrated by the peril.

With reference to the third point, the facts do not support it. No proof was given of any prohibition by the German Government against giving up the goods of British owners.

*Sir John Simon, K.C.*, in reply. It is not necessary in the notice of abandonment to specify the reason for which it is given. Sect. 62 of the Marine Insurance Act, 1906, deals with notice of abandonment, and it does not say that the reason for abandoning must be given. The object of the notice is to prevent the assured from changing his mind and to enable the insurer to take steps to protect his own interests. There is nothing in ss. 60 and 62 which shows that the assured must select the peril on which he abandons.

*Cur. adv. vult.*

May 12. SWINFEN EADY L.J. read the following judgment :— The facts which give rise to the dispute in this case may be very shortly stated. [The Lord Justice stated the facts.]

On behalf of the plaintiffs it is first contended that the venture of the carriage of the goods to Hamburg was lost by one of the perils insured against, namely, men-of-war ; that it was solely owing to the presence of hostile men-of-war in the Mediterranean that the ship was unable to continue her voyage ; that actual capture or seizure

(1) [1913] 3 K. B. 407 ; [1914] 3 K. B. 1121.
(2) 3 Bos. & P. 388.
(3) 5 Esp. 50.
(4) [1914] 3 K. B. 1121.
(5) [1916] 1 A. C. 650.
(6) (1821) 6 Wheat. Rep. 176.

was not necessary, as appears from the case of the Spanish dollars, *Butler* v. *Wildman* (1); and reliance was placed on Phillips on Insurance, 3rd ed., vol. i., s. 1115, p. 657, where in a section dealing with the risk of capture and restraints it is said: "Where, after the risk has begun, the voyage is inevitably defeated . . . . by a hostile fleet being in the way rendering the proceeding upon it utterly impracticable . . . . an assured on the cargo has a right to abandon."

On the other hand it was contended on behalf of the defendants that the *Kattenturm* was never in danger of capture, and ran no risk from men-of-war, because she determined to avoid all risk by entering and remaining in a neutral port.

It is well established in the English law of marine insurance that in many cases the loss of an adventure by a resolution not to incur a particular peril is not the same as, and does not occasion, a loss by the peril itself: *Hadkinson* v. *Robinson* (2); *Nickels & Co.* v. *London and Provincial Marine and General Insurance Co.* (3); *Lubbock* v. *Rowcroft* (4); and the recent case of *Kacianoff* v. *China Traders Insurance Co.* (5) In *Lubbock* v. *Rowcroft* (4) Lord Ellenborough said "that the abandonment was from an apprehension of an enemy's capture; and not from any loss within the terms of the policy; that if such was allowed, every ship about to sail from the Port of London for a port which had fallen into the hands of the French, might be abandoned."

It was urged that these authorities, except *Kacianoff's Case* (5), were old ones, and were not applicable to the way in which commerce was conducted at the present time, and that the chance of avoiding a blockading squadron or the risk of being captured at sea was very different in the days of sailing ships from the present days of rapid steaming and wireless telegraphy. It was contended that, if the *Kattenturm* had attempted to proceed through the Straits of Gibraltar to Hamburg, there was a practical certainty that she would have been captured, and that, as the subject-matter insured was reasonably abandoned on account of its actual total loss appearing to be unavoidable, there was a constructive total loss within

(1) 3 B. & A. 398.
(2) 3 Bos. & P. 388.
(3) (1900) 6 Com. Cas. 15.
(4) 5 Esp. 50.
(5) [1914] 3 K. B. 1121.

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s. 60 of the Marine Insurance Act, 1906. In the recent case of *British and Foreign Marine Insurance Co.* v. *Sanday* (1) the House of Lords referred to *Hadkinson* v. *Robinson* (2) and *Lubbock* v. *Rowcroft* (3) without disapproval and as existing authorities. Lord Atkinson pointed out that in each of those cases the deterrent was the risk of ultimate capture if the ships proceeded to their destination, and that the vessels prudently resolved not to incur that risk. It is not difficult to draw a line between vessels which determine not to run a particular risk and vessels which persevere in their voyage and enter a zone in which they are in peril, persisting until it becomes clear that in the existing circumstances they cannot complete the voyage and escape from the peril, and that the only course is either to desist and abandon the voyage, or inevitably incur a loss by the particular peril. There may be difficulty in applying the distinction to the facts of each case where the case is brought near the dividing line.

In my opinion the *Kattenturm* was never in peril of capture by men-of-war. Her commander prudently resolved not to incur that risk. There appears to be some ground for believing that she arrived at Messina earlier than August 5, but, taking the 5th as the accurate date, only one hour would elapse between a state of war at 11 P.M. on August 4 and the early morning of the 5th, and the time of her arrival on the 5th, or the period during which she had been in neutral Italian waters off the Sicilian coast, does not appear. Indeed it does not appear that she was at any time outside neutral territorial waters after a state of war had arisen. She left Malta not later than August 3, and the distance to Sicily is only about fifty miles. Under these circumstances I am of opinion that no loss by men-of-war was incurred.

It was urged, nevertheless, that having regard to the construction placed by the House of Lords on the Marine Insurance Act, 1906, the plaintiffs were entitled to succeed ; that the subject-matter insured included the adventure, and not merely the goods ; and that the party assured was irretrievably deprived of it, because all prospect of safe arrival on the voyage to Germany was hopelessly frustrated when the *Kattenturm* desisted from her voyage and sought refuge

(1) [1916] 1 A. C. 650, 665. (2) 3 Bos. & P. 388.
(3) 5 Esp. 50.

in Sicily. It was said that the case came directly within s. 60 of the Act as interpreted in *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1), and that the subject-matter insured (i.e., the adventure) was reasonably abandoned on account of its actual total loss from capture by men-of-war appearing to be unavoidable.

But to entitle the assured to recover under s. 60 the actual total loss must appear to be unavoidable from a peril insured against, and, to use the language of Lord Atkinson in *British and Foreign Marine Insurance Co.* v. *Sanday* (2), "Actual capture was . . . . the peril insured against. The apprehension of capture is an entirely different thing and was not insured against."

The next question is, Was there a loss by restraint of princes? It is said that immediately on the outbreak of war it became unlawful for the plaintiffs, as British subjects, to trade with the enemy by sending goods to Hamburg; the sale made by the plaintiffs was to a German firm, on terms of cash in London against documents within twenty-four hours of the official arrival of the steamer at port of destination: final settlement on average landed weights at port of discharge, expenses of weighing to be paid by seller. The contention of the plaintiffs is that on the outbreak of war the further prosecution of their venture became illegal; the declaration by His Majesty that a state of war existed was an act of State, making it thenceforward illegal for British subjects to trade with Germany; that the declaration of war amounted to an order to every subject of the Crown to conduct himself in such a way as he is bound to conduct himself in a state of war; that every State ultimately enforces obedience to its laws by force; that restraint is equally imposed whether force is immediately available or not; and that in this case the venture was rendered illegal and was destroyed by restraint falling within the words "restraint of kings, princes and people."

In support of this argument the case of *British and Foreign Marine Insurance Co.* v. *Sanday* (1) was relied upon. It was urged that the effect of that decision was to render every British venture on the high seas which involved trading with the enemy a constructive total loss by the peril of a "restraint of kings, princes," &c., whether such peril in fact occasioned the loss or not. It is true that in that case the owners of the goods took no steps to countermand the

(1) [1916] 1 A. C. 650. (2) [1916] 1 A. C. 665.

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venture, but after the cargoes had been landed by the shipowners at British ports the owners of the goods gave notice of abandonment to the underwriters. After the goods had been landed and warehoused at the instance of the shipowners, and after the owners of the goods had subsequently established to the satisfaction of the Customs authorities that the goods were not enemy goods, they were dealt with for the benefit of whomsoever it might concern. But it was the action of the shipowners in diverting their ships and landing the cargoes that prevented the voyage to Hamburg being continued. This clearly appears from the agreed statement of facts upon which the case proceeded and was decided.

It must be admitted that there is a close resemblance between the present case and *Sanday's Case* (1), looked at from this point of view. But on the other hand it has never yet been held in England that by the mere force of the existence of a state of war all goods owned by British subjects on their way to ports which during the voyage have become enemy ports, even though in neutral ships or enemy ships, become constructive total losses on the ground that trading with the enemy is restrained by what is to be deemed to be a "restraint of princes." Now the maxim causa proxima non remota spectanda est has been strictly applied in marine insurance cases. Is it true to say that in point of fact what frustrated the adventure in the present case, and prevented the goods from being carried to Hamburg, was the fact that trading with the German enemy had become unlawful for British subjects? Certainly not. In my judgment, the fact that the adventure had become illegal by the English common law had no weight whatever with the German master of the *Kattenturm*. The inference which I should draw from the facts proved in this case, including the letter of September 4, 1914, written by this German master to Baylis Heynes, Lloyd's agent at Messina (2), is that, if he could have been sure of evading all hostile cruisers and of arriving safely at Hamburg with the goods, he would certainly have pro-

(1) [1916] 1 A. C. 650.

(2) This letter was written in answer to one from Mr. Baylis Heynes to the captain of the *Kattenturm* protesting on behalf of the British cargo owners and underwriters against his leaving Messina for Syracuse, and in the letter in reply the German captain said that "as long as the cargo remains in the German steamer *Kattenturm* under my command you have no business to trouble about it."

ceeded upon the voyage and given himself the pleasure of taking to Hamburg and landing safely there all British goods. Again, the possibility of forwarding the goods from Italy by some other vessel was effectually prevented by the Italian decree prohibiting jute from being exported from the country even if such a course had previously been practicable, of which there is no evidence whatever. The plaintiffs, as owners of the jute on board, did not and could not take any steps to prevent the voyage being continued, if the master of the ship decided to continue it. The master of the vessel acted as to him seemed best, both with regard to the ship and the goods on board. If the jute had belonged to a neutral owner, not affected by the consideration of trading with an enemy, the position would have been the same ; the voyage in the *Kattenturm* would not have been continued, and transhipment and forwarding by another vessel, even if otherwise practicable in fact, was prevented by the law against the exportation of jute.

The ground of the decision in *Sanday's Case* is thus stated by Lord Loreburn (1) : " Among other things, trading to German ports became unlawful, and an instant duty arose for these two ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offence, and, in fact, impracticable." And : " The destruction of that adventure was directly caused by His Majesty's declaration." That language has no application to the present case. The British shipowner was bound to obey the British law and he did so. The German captain was not so bound. The continuance of the voyage was illegal for the British captain ; perfectly legal for the German captain. The illegality in fact prevented the British captain from proceeding with his voyage to Hamburg ; it did not prevent the German captain, or indeed influence him in the very slightest. Except for the risk from a different peril the German ship might, and probably would, have proceeded on her voyage and arrived safely at Hamburg, and the goods would have been landed from the ship and safely warehoused. Restraint of princes operating to frustrate an adventure by rendering it illegal had no operation in the present case, and in my opinion the plaintiffs cannot succeed on that ground. The mercantile venture of the plaintiffs was frustrated by the detention

(1) [1916] 1 A. C. 658, 660.

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of the goods for an indefinite time in Italy, but such detention was not occasioned by any peril insured against; not by a "restraint of princes" rendering illegal the further prosecution of the voyage.

I cannot arrive at a conclusion of fact that the actual total loss of the adventure from that peril appeared to be unavoidable, within s. 60, when that peril did not prevent or affect the continuance of the voyage, and when, if the voyage had proceeded, the adventure would probably have been frustrated by a different peril, capture of the German ship, and when in such a case the underwriters would have been in a different position, as these goods in the ship were British goods.

The third ground upon which the plaintiffs relied was that a loss from the peril of "enemies" had arisen, since the master of the *Kattenturm* and the Hansa Company, of Bremen, German subjects and therefore enemies, had refused to give up the goods at Messina when requested to do so. It will be sufficient to say that the goods were given into the possession of the master by the true owners, and a refusal to re-deliver them at a port of refuge during the voyage, even if wrongful, is not a peril from "enemies" within the meaning of the policy.

In my judgment Bailhache J. came to a right conclusion, and this appeal should be dismissed.

PICKFORD L.J. read the following judgment:—This was an action upon a policy of insurance effected by the plaintiffs with the defendants upon jute shipped by the plaintiffs upon the German steamer *Kattenturm* at and from Calcutta to Hamburg, and by the London Jute Association insurance clauses extending to a period not exceeding fifteen days from final discharge of the vessel. The policy included war risks, and was against the usual perils, of which I need only mention men-of-war, enemies, takings at sea, arrests, restraints, and detainments of all kings, princes, and people.

The facts are stated in the judgment of the Court below and of Swinfen Eady L.J., and I shall only state them generally. At the time of the declaration of war between Great Britain and Germany the *Kattenturm* was in the Mediterranean proceeding on her voyage, and about August 5 or 6 she put into Messina and afterwards shifted to Syracuse. The plaintiffs did not at the time of declaration of

war know exactly the position of the *Kattenturm*, but they knew she was on her voyage, and on August 18 wrote to the defendants mentioning her name as one of the German steamers in which they were or might be interested. Later in the month they seem to have obtained information that she had put into Messina, and on September 1 they gave notice of abandonment as a constructive total loss, through consequence of hostilities, of the jute on board the steamship *Kattenturm* "stopped at Messina." The defendants declined to accept the abandonment, but agreed to put the plaintiffs in the same position as if a writ had been issued.

There was a dispute with the master of the vessel as to his giving up the goods, which he at first refused to do except upon terms to which the plaintiffs would not agree, but eventually they were sold to an Italian buyer without prejudice to the rights of the parties to the policy of insurance. In the meantime the plaintiffs had given a second notice of abandonment on December 16 in these terms: [The Lord Justice read the letter.] The defendants declined to accept this abandonment also.

Upon these facts the plaintiffs claimed payment from the defendants as for a constructive total loss on the following grounds: (1.) That the frustration of the venture was a loss of the goods; (2.) that the venture was frustrated by the restraint of princes because the declaration of war rendered it illegal for the plaintiffs to carry it out by sending the goods on to Hamburg and delivering them to an alien enemy; (3.) that there was a loss by capture or men-of-war because the *Kattenturm* at Messina could not continue her voyage without certainty of capture by reason of the proximity of French and English cruisers; (4.) that there was a loss by enemies because the goods were in the hands of an alien enemy on an enemy ship. I agree with Bailhache J. that the master had no intention of prosecuting the voyage further than Messina within a time that would have been commercially practicable, and that if he had in fact prosecuted his voyage and gone much further he would almost certainly have been captured by the French or English fleets, and that the voyage was then and there abandoned. I also agree with him that by the abandonment of the voyage there was a destruction of the adventure.

It was argued before us that this was not the fact and that the

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adventure was destroyed because the goods were the property of British subjects, because if they had belonged to neutrals they could have been transhipped into a neutral vessel and carried to their port of discharge. This may well be so theoretically, but there was no evidence that it could have been done within a time that would have been commercially practicable, and I shall not without evidence assume a state of facts which I do not think existed. I therefore think that the act of the master in putting into Messina and remaining in Italian waters was a destruction of the adventure whether the goods belonged to a British owner or not.

I think it is decided by the case of *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1) that the frustration of the adventure is a loss of the goods, and that the Marine Insurance Act, 1906, has not altered the law in that respect. That case also, I think, decides that a declaration of war by the Sovereign, by making it illegal to have any commercial relations with the enemy, is a restraint of princes, and that if either the cargo owner or the shipowner, by reason of the declaration, terminates the adventure of sending goods to an enemy port, that is a loss by restraint of princes. It is true that in that case the restraint was exercised on the action of the shipowners who gave up the voyages, but I think the principle applies equally to the cargo owner, and if he terminates the adventure by reason of the proclamation, I think the authority of that decision shows that there is equally a loss by restraint of princes. This, I think, is the effect of that decision, and we must accept it.

The respondents, however, contended that in this case the plaintiffs had not terminated the venture on that ground, but that it was terminated by the act of the master in breaking off the voyage at Messina and so making it impossible to carry out the venture. It is not necessary to state any reason for abandonment in the notice, and the plaintiffs did not state any, except the wide ground of consequence of hostilities, but I think the only inference to be drawn from the facts is that they intended to abandon because of the breaking off of the voyage and consequent inability to carry out the venture. I have already said that I think the breaking off of the voyage did frustrate the venture irrespective of the nationality of the owners of the goods.

(1) [1915] 2 K. B. 781 ; [1916] 1 A. C. 650.

The declaration of war did not prevent the master of the German ship from carrying the goods on to Hamburg if he could escape the enemy cruisers, and the plaintiffs could have done nothing to prevent him, but they could have given notice of abandonment, and they did not do so during the whole of the month of August, but only after they had heard that the *Kattenturm* had stopped at Messina, and when they repeated the notice it was on the ground that they could not obtain the goods because the master had been prohibited by the German Government from giving them up. I am satisfied that in giving notice of abandonment they were not acting in any way on the declaration of war and had not it present to their minds in any way. The point was stated to be a new one in insurance law by Lord Reading C.J. in *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1), and it obviously did not occur at that time to the plaintiffs. If it had, they would have given notice of abandonment at once if they wished to act on it.

It was, however, argued for the plaintiffs that the declaration acted automatically, as it is called by Bailhache J. (2), or ipso facto, to use the words of Lord Wrenbury (3), and immediately destroyed the adventure without any action or exercise of volition on the part of the plaintiffs. I do not think this is so. The adventure is carrying the goods to Hamburg. I think there may be cases in which the adventure would not be frustrated by the declaration of war, and the cargo owner might not be able to prevent the cargo being carried on to the port of destination and delivered, and the maritime adventure so completed, although the result might be the loss of the goods by capture when they arrived. I do not think the decision in *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (4) did go so far as the contention of the appellants. It decided that after the declaration of war it was the duty of shipowner and cargo owner not to pursue the adventure, and if either in consequence terminated the adventure there was a loss by restraint of princes.

In this case, as I have said, the adventure was in fact terminated for another reason altogether, that is, because the master put into Messina and discontinued the voyage, and it was not possible to send on the goods, whatever the nationality of the owners, within any

(1) [1915] 2 K. B. 807.
(2) [1915] 2 K. B. 789.
(3) [1916] 1 A. C. 671.
(4) [1916] 1 A. C. 650.

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commercially possible time. It seems to me that this termination of the adventure was the proximate cause of the loss, and that it is not open to the plaintiffs to say that they might have terminated it for another reason, and if they had done so it would have brought the loss of the adventure within another peril. I think, therefore, that there was not a loss from restraint of princes.

On the other two points I agree with the judgment of Bailhache J. and do not think it necessary to discuss them at length.

I agree with the argument of the appellants that, in considering the series of cases from *Hadkinson* v. *Robinson* (1) to *Kacianoff* v. *China Traders Insurance Co.* (2), regard must be had to the changed conditions of war, and that such questions are always one of degree, but I can see no reason for differing from the conclusion of Bailhache J. that the master in this case put into Messina to avoid a peril, and not in consequence of a peril.

I think the appeal should be dismissed.

BANKES L.J. read the following judgment:—This is an appeal from a judgment of Bailhache J. The appellants are merchants in London. In June, 1914, they entered into a contract to sell 500 bales of jute to a German firm. The contract provided that the jute was to be shipped from British India to Hamburg between June 1 and June 30 of that year, and that payment was to be made in cash in London within twenty-four hours of the official arrival of the steamer at the port of destination in exchange for bill of lading and freight release and policy or approved letter of insurance. The contract also contained provisions as to the weighing of a certain percentage of the bales at the port of destination. In part fulfilment of this contract the appellants shipped 218 bales on board the German steamer *Kattenturm* at Calcutta, and took out a policy of assurance with the respondents covering the goods on the voyage from Calcutta to Hamburg, and for a period not exceeding fifteen days from the final discharge of the vessel, if the goods were temporarily placed on quay or in barge at Hamburg awaiting delivery being taken by the consignee.

The *Kattenturm* sailed from Calcutta on some date in July, and on August 4, the date when war was declared between this country and

(1) 3 Bos. & P. 388. (2) [1914] 3 K. B. 1121.

Germany, she was in the Mediterranean. On either August 5 or 6 the vessel put into Messina, and later she was moved to Syracuse. The learned judge came to the conclusion upon the evidence before him that the master of the vessel, when he put into Messina, did not intend to continue the voyage, and that from a commercial point of view the voyage must be treated as having been abandoned at that time. I agree with the view taken by the learned judge. The immediate effect upon the appellants' position of the declaration of war, coupled with the action of the master of the vessel and the impossibility of transhipping the goods on to any other vessel, was undoubtedly to put an end both to their commercial adventure of selling the goods to the German firm and to their maritime adventure of having the goods conveyed from Calcutta to Hamburg for delivery to consignees there. It is with the latter adventure only that the respondents are concerned, and their concern in it is limited by the terms of the policy which they issued to the appellants. The risks against which the respondents, by the terms of their policy, undertook to indemnify the appellants included men-of-war, enemies, takings at sea, arrests, restraints, and detainments of all kings and princes.

The question raised by the action and in this appeal is, to use the language of s. 55 of the Marine Insurance Act, 1906, whether the loss which the appellants undoubtedly suffered was proximately caused by a peril insured against. The learned judge decided that it was not.

The appellants put their case in a number of different ways and endeavoured to support it on a number of quite different grounds. They contended, in the first place, that when the *Kattenturm* put into Messina she was in the zone of peril and in risk of capture by English or French men-of-war, and that consequently the loss of the adventure was due to a peril insured against. This appears to have been made the main argument in the Court below. The learned judge decided against the appellants' contention on the facts. He came to the conclusion that the master of the *Kattenturm* put into Messina and afterwards into Syracuse to keep out of harm's way and to avoid any peril of capture; and in this view I agree. It was argued before us that modern conditions required a different view to be taken of what constitutes being in actual peril from what was

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taken in former times under quite different conditions. I do not agree that this argument goes the length contended for. Conditions have certainly entirely altered, but there must still always be a dividing line between the case of a vessel which is in real peril of capture and the case of a vessel whose master has taken sufficiently early and sufficiently complete steps to keep altogether out of harm's way. In my opinion the earlier authorities on this point are still good law, and I think that this was recognized as being so in the recent decision in the House of Lords in *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1) Upon this first point, therefore, the appellants fail.

A second point taken was that there was a loss caused by "enemies," and this was based upon the contention that the master of the *Kattenturm* refused to hand over the goods either at Messina or at Syracuse, and that this refusal amounted to a seizure of the goods by an enemy. In the Court below the learned judge treated this as a point which was not pressed, and it is sufficient to say with regard to it that when the facts are considered they do not, in my opinion, establish the contention.

The last point is the one which was most pressed in this Court and was put in the forefront of the argument. It was contended that the effect of the declaration of war rendered it unlawful and impossible for the appellants to complete the adventure, and that even if the master had determined to continue the voyage and had landed the goods at Hamburg, their seizure there by the enemy was inevitable, and that on these grounds there was, within the meaning of s. 60 of the Marine Insurance Act, 1906, a constructive total loss of the subject-matter insured, because that subject-matter had been reasonably abandoned on account of its actual loss appearing to be unavoidable. In support of this contention the decision in *Sanday's Case* (1) was much relied on. There is, however, this essential distinction between the facts in *Sanday's Case* (1) and the facts in the present one. In *Sanday's Case* (1) there was no dispute that the masters of the vessels did in fact desist from their respective voyages because of the declaration of war and the illegality of proceeding to their destinations, and that the owners of the goods gave notice of abandonment because of the action of the masters in thus deter-

(1) [1916] 1 A. C. 650.

mining the adventures. In the present case both points are in dispute. This point Bailhache J. appears to have dealt with very shortly in the Court below. In the report of his judgment in *The Times* Law Reports (1) he says that the question does not arise having regard to the decision at which he had arrived on the first point. In this conclusion of the learned judge I agree. Having regard to the stress laid upon this part of the appellants' case, I think it necessary to state my reasons. The appellants have insisted upon their right to have attention focussed upon their position and their action as cargo owners, and claim that their position must not be prejudiced by a consideration of the action of the shipowner or his master, over whose actions they have no control, and whose actions do not bind them. They complain that sufficient attention has not been paid to their position and their action in the decision at which the learned judge has arrived. It appears to me that the weak part of the appellants' case on this point is that it fails to pay sufficient attention to what, in my opinion, was the real position and action of the appellants. It is an essential condition of a constructive total loss that there shall have been an abandonment by the assured to the insurer, and abandonment involves an election by the assured. The assured has an option whether he will or will not elect to treat any given set of circumstances as a constructive total loss. If he does so elect he must, in a case like the present, give notice of abandonment within a reasonable time after the receipt of reliable information of the loss : s. 62, sub-s. 3, of the Marine Insurance Act, 1906. When once the assured has exercised his option and given notice of abandonment he must, I think, be bound by his election. Further, to render the insurer liable upon a policy, the assured must show that the circumstances which he has elected to treat as a constructive total loss were the proximate cause of the loss sustained. If these conclusions are correct, how do they apply to the present case ? They appear to me to put the appellants in this difficulty. If the appellants elected to treat the action of the master in abandoning the voyage at Messina as a constructive total loss; then they exercised their option in respect of circumstances which, upon the finding of the learned judge, and in my opinion also, were the proximate cause of the loss sustained, but which, on the other hand,

(1) 31 Times L. R. 538. See also 21 Com. Cas. 43, 51.

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were not brought about by a peril insured against. If, on the other hand, they seek to found their election on some other set of circumstances, they must prove (1.) that they did so elect and (2.) that the circumstances were the proximate cause of the loss sustained. As I understand the decision in *Sanday's Case* (1) in the House of Lords, it is an authority for the proposition that had the assured immediately on the declaration of war elected to treat that circumstance, with its attendant consequences not only of the illegality but the impossibility of completing the adventure, as a constructive total loss, they would have been entitled to recover in this action. In my opinion there is no evidence that the appellants did so elect. On the contrary, I think the evidence is conclusive the other way. No notice of abandonment was given until September 1, which seems to me very late, if not too late, if the election was founded on the declaration of war, but in any event is quite inconsistent with the idea that the appellants were exercising their option because of the declaration of war, the effects of which were immediate and required no investigation. In the second place, the notice, when sent, refers to the fact that the *Kattenturm* was stopped at Messina. The third fact that appears to me to be very material on this point is that a second notice of abandonment was given as late as December, and the ground is stated to be that the owners of the *Kattenturm* had definitely stated on November 20 that the German Government had prohibited any delivery of the goods to British subjects. If this is the true inference from the facts, it seems to me impossible for the appellants to ignore the action of the master in abandoning the voyage as he did ; that action did in fact frustrate the adventure, and unless the appellants can show that they took advantage of some circumstances anterior in date to the action of the master, his action must be the proximate cause of the loss, and any subsequent action of the assured becomes immaterial.

For these reasons I think that the judgment of Bailhache J. was correct.

*Appeal dismissed.*

Solicitors for plaintiffs : *Rehder & Higgs.*
Solicitors for defendants : *Waltons & Co.*

(1) [1916] 1 A. C. 650.

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[IN THE COURT OF APPEAL.]

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*Jan.* 28 ; *March* 31.

## COX *v.* COULSON.

*Negligence—Warranty by Lessee and Manager of Theatre—Injury to Member of Audience during Performance.*

The defendant was the lessee and manager of a theatre. He had arranged for the performance of a play in his theatre with the manager of a touring theatrical company, who was to provide actors and scenery, the defendant providing the theatre, the lighting, and the playbills ; each took an agreed proportion of the receipts. The plaintiff took and occupied a seat in the theatre ; during the performance an actor fired a pistol, which should have contained only a blank cartridge, but in the barrel of which, by some unexplained mischance, there was also a second cartridge of smaller size, which when the pistol was fired struck the plaintiff on the wrist, inflicting a serious wound. The county court judge held that it was an implied term of the contract between the plaintiff and the defendant that all persons connected with the performance of the play should exercise reasonable care so that members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care :—

*Held*, that the implied warranty found by the county court judge was too wide, that the true relation between the plaintiff and the defendant was that of invitor and invitee, that the defendant owed the plaintiff a duty to use reasonable care that she was not exposed to unusual danger, the existence of which the defendant either knew or ought to have known, and that there must be a new trial to inquire into the supervision exercised over the firearms and the ammunition for them and into the loading of the pistols.

Appeal from the decision of a Divisional Court (Bailhache and Shearman JJ.) upon appeal from the judgment of the judge of the county court of South Shields.

The facts were as follows :—The defendant was the lessee and manager of a theatre at South Shields. He had arranged for the performance of a play entitled " In Time of War " in his theatre with the manager of a touring theatrical company, who was to provide actors and scenery and to receive 40 per cent. of the receipts, the defendant taking the remaining 60 per cent. and paying for the lighting and the playbills.

The plaintiff, a domestic servant, took and occupied a seat in

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the dress circle for a performance of the play. During the performance an actor fired a pistol, which should have had nothing but a blank cartridge in it. By some mischance, of which no explanation was given, there was also in the barrel of the pistol a second cartridge, of smaller size than the one with which the pistol was properly loaded; the pistol, when fired, was pointed by the actor towards the audience, and the plaintiff was struck in the wrist by the loose cartridge, which inflicted a serious wound. The plaintiff sued the defendant in the South Shields County Court to recover damages for the injury sustained. There was no evidence as to what supervision was exercised over the firearms, or the ammunition for them, or the loading of the pistols. The county court judge held that it was an implied term of the contract between the plaintiff and the defendant that all persons connected with the performance of the play should exercise reasonable care so that the members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care, and gave judgment for the plaintiff with 50*l.* damages.

On appeal the Divisional Court were divided in opinion, Bailhache J. being of opinion that the defendant impliedly warranted that the actors should not be guilty of negligence, while Shearman J. thought that his warranty extended no further than that no part of any performance should be in itself of a dangerous nature. The judgment of the county court judge was therefore affirmed.

The defendant appealed.

*Lowenthal*, for the defendant. The defendant did not assume any responsibility for the production of the play, the playbill stating explicitly "The whole produced under the supervision of Mr. C. Watson Mill," who was the manager or proprietor of the touring company. It may be true that the lessee by the invitation contained in the playbill does impliedly represent that the performance will be safe, but he does not warrant it. The actors in the play were not the servants of the defendant, and it cannot be that he warranted that persons over whom he had no control should not be guilty of negligence in the performance of the play. Nor was there any partnership between Mill and the defendant. If the defendant's warranty extends so far, there is no reason why

it should not extend to warranting that no other member of the audience will act negligently. A man is only responsible for the acts of others if he contracts to be so or if they are his servants. [He cited *Readhead* v. *Midland Ry. Co.* (1), *Le Lievre* v. *Gould* (2), *Francis* v. *Cockrell* (3), and *Welsh* v. *Canterbury and Paragon, Ld.* (4)]

*Simey*, for the plaintiff. The decision of the county court judge was substantially right in law. *Welsh* v. *Canterbury and Paragon, Ld.* (4) cannot have proceeded on the ground that Blondin, the performer, was the servant of the defendants, for the defendants pleaded that he was negligent; the case is an authority that the defendant may be held liable for the acts of a person who is not his servant. The playbill is not a mere announcement that Mill will present the play; it contains the representation and announcement of the defendant, not of Mill. Nor is it prepared by the defendant as the agent of Mill. There is a contract between the plaintiff and the defendant that for the sum of 9*d.* she shall be entitled to enter the theatre, have a seat, and witness the performance; and such a contract must contain an implied warranty. If in order to perform his contract the defendant has to make certain arrangements with other persons, he is responsible for the way in which his employees or servants perform the contract as his agents. A person with a duty to perform is responsible for the way in which his employees or servants perform it. The liability of the defendant is analogous to that of a railway company which contracts for the carriage of a passenger on a journey extending in part over another company's line, and so becomes liable for the negligent acts of the servants of that other company.

[Swinfen Eady L.J. What do you say is the contract?]

That the plaintiff shall have the right to see the performance, and that it shall be conducted without negligence in any one taking part in it. I do not put the warranty in the form that it shall be a safe performance; there is no unsafe performance if it be conducted without negligence. If the county court judge has applied the wrong warranty, I should not contend that the Court can apply the proper warranty to the facts; the case would have to

(1) (1869) L.R. 4 Q. B. 379.
(2) [1893] 1 Q. B. 491.
(3) (1870) L. R. 5 Q. B. 184.
(4) (1894) 10 Times L. R. 478.

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go down for a new trial. [He cited *Penny* v. *Wimbledon Urban Council* (1), *Pickard* v. *Smith* (2), *Great Western Ry. Co.* v. *Blake* (3), and *Thomas* v. *Rhymney Ry. Co.* (4)]

*Lowenthal* in reply.

*Cur. adv. vult.*

March 31. Swinfen Eady L.J. read the following judgment :— The plaintiff recovered judgment in the South Shields County Court for 50*l.* damages for injuries sustained by her while attending a performance at the Theatre Royal, South Shields, of which the defendant is lessee and manager. On appeal to the Divisional Court (5) Bailhache J. was of opinion that the judgment of the county court judge was right and that the appeal should be dismissed. Shearman J. was of opinion that the judgment of the county court judge was erroneous in point of law and that the appeal should be allowed and that there should be a new trial.

The defendant, who is the lessee and manager of this Theatre Royal, arranged with Mr. Watson Mill to bring a theatrical company and present a drama entitled " In Time of War," of which Mr. Mill is the author. The terms were that the defendant was to provide the theatre, pay for the lighting and for the playbills, and receive 60 per cent. of the gross takings. Mill was to provide and pay the company, provide the scenery and the appliances for the play, and receive the remaining 40 per cent. of the gross takings.

The plaintiff, who is a domestic servant, took a seat in the dress circle for the performance, for which she paid 9*d.* During the performance, and as an incident to it, an actor discharged a pistol which should have had only a blank cartridge in it. By some unexplained accident a cartridge of smaller size than the blank one was apparently loose in the barrel, and when the pistol was fired it was directed towards the audience, and the loose cartridge was expelled and unfortunately struck and injured the plaintiff in the wrist. The injury is admitted, and there is no question as to the amount of the damages.

The sole question is whether the defendant is legally liable for

(1) [1899] 2 Q. B. 72.
(2) (1861) 10 C. B. (N.S.) 470.
(3) (1862) 7 H. & N. 987.
(4) (1871) L. R. 6 Q. B. 266.
(5) (1915) 31 Times L. R. 390.

the accident, and, if so, upon what ground. The actor who discharged the pistol was not a servant or employee of the defendant, so the latter cannot be liable upon that ground. Nor can the defendant be fixed with liability on the ground of being a joint adventurer with Mill. Although the gross takings were divided between them, there was not any partnership; each had to discharge his own separate liabilities in respect of the venture. The travelling expenses, the remuneration of the actors, the cost of the appliances had to be borne entirely by Mill. The theatre rent and outgoings, the cost of lighting, and the cost of the playbills were wholly to be borne by the defendant. One of them might have made a profit out of the venture, and the other might have made a loss. Neither of them had authority to bind the other in any way; there was no agency between them. The sharing of gross returns does not of itself create a partnership: see the Partnership Act, 1890, s. 2, sub-s. 2.

If the defendant is under any liability it must arise out of the contract which was made when, having held out by means of the playbill an invitation to his theatre, he issued a ticket to the plaintiff and received her 9*d.* The contract, whatever its implied terms may be, was made between the defendant and the plaintiff, as the defendant received the takings from the persons paying and issued the tickets to them. The defendant must be taken to have agreed that the play described in the playbill would be produced, and that a person paying for a ticket would be permitted to enter the theatre, witness the performance, and remain there until the performance concluded, behaving properly and complying with the rules of the management: *Hurst* v. *Picture Theatres, Ld.* (1) The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care: *Francis* v. *Cockrell* (2); *Norman* v. *Great Western Ry. Co.* (3)

The defendant does not absolutely warrant the security of his premises: *Readhead* v. *Midland Ry. Co.* (4) He does, however, warrant, not only that there shall be due care on the part of himself and his servants, but also that there shall be due care on the part of

(1) [1915] 1 K. B. 1.
(2) L. R. 5 Q. B. 184.
(3) [1915] 1 K. B. 584.
(4) L. R. 4 Q. B. 379, 385.

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any independent contractor who may have been employed by him in the construction or repair of the premises. The principle is that where a legal duty is incumbent on a person, that duty is not discharged by employing a contractor who imperfectly performs it. This, however, only deals with the premises, and the accident did not happen through any defect in the premises.

Is there, then, to be implied, in the contract between the plaintiff and the defendant, any term with regard to the play apart from the premises in which the play is to be performed? The play involved the use of firearms, and according to the evidence included a scene in which a wireless station was defended against an enemy; the performers were dressed as soldiers and were shooting with revolvers. Such a scene, properly performed and without negligence, would be free from danger, but injury would be likely to result from it unless care was taken in loading and using the firearms.

The county court judge held that it was an implied term of the contract between the defendant and the playgoer that all persons connected with the performance of the play should exercise reasonable care so that the members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care. In my opinion this is too wide, and there is no authority and no principle upon which so extended a liability can be said to rest upon a person who, for reward, agrees that others shall enter his premises and witness the performance of a play there. Upon this footing the defendant would be liable for any negligence of the performers as if they were his servants. It was, however, upon this view of the law that the judgment of the county court judge proceeded.

In the Divisional Court Bailhache J. thus expressed himself: "I think that involves certainly on the part of the lessee and manager, with whom I am only concerned at the moment, a warranty not only as to the state of the building structurally, but also some warranty as to the play that is to be performed. How far does that warranty go? I think it certainly goes to this, that the play itself is a safe play and one which, properly performed, may be performed without danger. Does he warrant that persons engaged in the play, not as servants, shall not be guilty of negligence? I am myself disposed to think he does, and I am myself disposed to think that,

when he enters upon the business of running a theatre for profit, it is quite immaterial whether the persons he engages to perform in the theatre are engaged as his servants, or whether they come as a company, being engaged as a company and sharing the profits. I think myself it is quite immaterial which of those things it is, and I think myself that he does warrant that the actors shall not be negligent. I am only speaking for myself because I am afraid we are not agreed upon this "—that is, the learned judge and Shearman J. "Speaking for myself, I entertain no doubt that he warrants as much as this, that if in the course of the performance there is an incident in the play or an action in the play which is of a dangerous character if not carefully performed, that particular incident or action in the play shall be performed with due care." Shearman J. did not take the same view, and he put it in this way: "It was argued during the hearing of this case by counsel for the lessee that there was no other warranty than that the house should be reasonably safe. I think that puts the warranty too low. On the other hand, it was argued on behalf of the plaintiff that there was a warranty that every person who performed on the stage should not be negligent. I think that puts it too wide. I feel it extremely difficult to say what the warranty is, but it is one's duty if one thinks the learned county court judge is wrong to say what one thinks the warranty is. I think the lessee of a theatre in these circumstances warrants that the building is safe. I think he warrants that there shall be no negligence on the part of his own servants, and I think he further warrants that no part of any performance shall be in itself of a dangerous nature." I am of opinion that the judgment of Bailhache J. would place a greater burden upon the defendant than the law imposes; nor in my judgment is the measure of the defendant's liability correctly expressed by Shearman J.

If there are incidents in a play which are intrinsically dangerous unless carefully performed, especially if they involve the use of firearms, and which the manager knew or ought to have known of, then, in my opinion, it is an implied term of the contract between the playgoer and the other contracting party that such contracting party will use reasonable care and diligence to see that such incidents are performed without risk to the playgoer. He is not, however, under liability for any accident which he could not have prevented by the

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exercise of reasonable care or supervision, but which happens through some carelessness or want of skill on the part of a member of the company. He does not warrant that there shall be no such negligence or want of skill. His liability is that of an invitor towards an invitee as expressed in *Indermaur* v. *Dames* (1) and in *Norman* v. *Great Western Ry. Co.* (2), per Buckley L.J. : " The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it."

If there is this implied term of the contract with the playgoer it is no answer to an action by him when injured to say that the lessee of the theatre who owes the duty agreed with an independent contractor to present the play and discharge the duty, and it was owing to the want of care and supervision of this contractor that the accident happened. " A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor " : per Lord Blackburn in *Dalton* v. *Angus* (3) ; *Pickard* v. *Smith* (4) ; *Tarry* v. *Ashton* (5) ; *Bower* v. *Peate* (6) ; *Hughes* v. *Percival.* (7)

The attention of the learned county court judge has not been directed to the case from this point of view. No evidence was given as to what supervision was exercised over the firearms, or the ammunition for them, or the loading of the pistols ; nor does he find in what any negligence of the defendant consisted—what the defendant could and should have done but failed to do. He does find that there was negligence of somebody, as there was an unexploded cartridge loose in the barrel of the pistol fired. It is true that it was not necessary for the county court judge to determine this, if the defendant was under the wider liability which the judge considered he was under.

For these reasons I am of opinion that the appeal should be allowed, the judgment set aside, and a new trial had.

(1) (1866) L. R. 1 C. P. 274, 288.
(2) [1915] 1 K. B. 584, 592.
(3) (1881) 6 App. Cas. 740, 829.
(4) 10 C. B. (N.S.) 470.
(5) (1876) 1 Q. B. D. 314.
(6) (1876) 1 Q. B. D. 321.
(7) (1883) 8 App. Cas. 443.

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Pickford L.J. read the following judgment :—This case raises a question on which there is very little authority, i.e., what is the responsibility of the lessee of a theatre towards a person who takes a ticket for admission to that theatre when a performance is given by a travelling company not engaged by the defendant and the lessee takes a part of the sum paid for admission.

In this case a performance was being given by a travelling company under the direction of a Mr. Mill. The piece was called "In Time of War," and it is only necessary to look at the playbill to see that firearms would certainly be used during the performance. The gross receipts arising from the performance were divided between the lessee and Mr. Mill, 60 per cent. to the former and 40 per cent. to the latter. The plaintiff paid 9*d*. for her ticket, which gave her admission to the dress circle.

In one of the scenes a pistol was fired, which of course should have been loaded with blank cartridge only. In fact a spent cartridge had been put into it above the blank cartridge which was to be fired. The actor who fired the pistol pointed it towards the audience, and the spent cartridge was driven out like a bullet and hit the plaintiff on the wrist, causing her serious injury. The question is whether the respondent is responsible for this act.

The learned county court judge has held that there was negligence in the spent cartridge being in the pistol, and in this finding I think he was quite right, but of course, if he has properly directed himself, the question of fact is entirely for him. He has held the defendant liable on the broad ground that he contracted that all persons connected with the play should exercise reasonable care so that the members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care ; in other words, that there was an implied warranty, or a contract, that the performance should be conducted with reasonable care.

If this be correct, the defendant is liable for a negligent act of one of the performers to the same extent as if they were his servants.

On appeal to the Divisional Court the two learned judges differed in opinion, Bailhache J., without dissenting from the view taken by the county court judge, holding that if in the course of a performance there is an incident in the play, or an action in the play, which is of a dangerous character if not carefully performed, he warrants

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that that particular incident in the play shall be performed with due care, and Shearman J. holding that he warrants there shall be no negligence on the part of his own servants, and that he further warrants that no part of any performance shall be of a dangerous character. By this further warranty the learned judge means "of a dangerous nature which cannot be guarded against by any skill or care," for he says: "If the performance is of a dangerous nature, a plaintiff who is injured by it can only succeed by showing that it was from the intrinsic danger of the performance that the injury to him necessarily happened." On the appeal before us it was argued that the learned county court judge's decision was right, and that the defendant's liability was similar to that of a railway company which contracts for the carriage of a passenger on a journey extending in part over another company's line, and so becomes liable for the negligent acts of the servants of that other company. For the defendant it was argued that his obligation was limited to that which he undertakes with regard to the structure of the building.

I do not think that the obligation is so wide as that held by the county court judge, or even so wide as that stated by Bailhache J. I do not think that a lessee who admits for his own profit a person to see a performance in his theatre given by a travelling company undertakes that he will be liable for the negligent acts of every member of that company to the same extent as if they were his own servants. On the other hand I think that the obligation as stated by Shearman J. in the last words I have quoted is too narrow. I do not think that the contract with the plaintiff is analogous to that of a railway company in the cases mentioned, i.e., a contract with her that the defendant will produce a play. It is a contract that, having arranged that a play shall be produced at his theatre, he will allow her to come to see it on payment to him. If it should not be produced the consideration for the payment fails, and the defendant must return the amount paid; but that is the only sense in which it can be said that he contracts that the play shall be produced.

The nature of the contract is, I think, correctly stated by Buckley L.J. in *Hurst* v. *Picture Theatres, Ld.* (1): "The plaintiff in the present action paid his money to enjoy the sight of a particular

(1) [1915] 1 K. B. 1, 7, 11, 13.

spectacle. He was anxious to go into a picture theatre to see a series of views or pictures during, I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end." The learned judge was considering the matter from a different point of view, but I think those words correctly express the result of the contract: see also the judgment of Kennedy L.J. This, I think, creates the relationship of invitor and invitee, and in such a case, from the nature of the invitation, the defendant's obligation, I think, is not confined to the structure. In addition to his obligation with regard to the structure and the further obligation not to give a performance of an intrinsically dangerous nature, or, if he do so, to take the consequences, he is, I think, under an obligation to take reasonable care that the performance of the play does not expose to danger the person whom he invites to see it. If there be incidents in it which are dangerous in their nature if proper precautions are not taken, he would have to take greater precautions than if there were no such incidents, and I think that he must exercise reasonable care and skill in seeing that such precautions are taken.

In this case it is obvious that firearms would be used, and it is common knowledge that unless proper care is taken in loading them they are dangerous, and I think there was an obligation on his part to take reasonable case that they were so loaded as not to be dangerous. I do not think that such an obligation necessarily imposes on him a liability for every unexpected act of negligence on the part of one of the actors. It may well be that he could not by any exercise of reasonable care and skill foresee or guard against such an act, but as it is clear from his own evidence that he had not entirely parted with the control of the theatre, I think it was a question of fact whether, considering that firearms were to be used, it was an exercise of reasonable care and skill to do nothing at all to see whether they were so loaded as to be harmless to the audience, but to leave the whole matter to Mr. Mill and his company.

I do not think the matter was considered from this point of view, as the judge decided on the ground of there being a larger liability than I think existed, and therefore, in my opinion, there should be a new trial.

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If necessary, I think the particulars should be amended to raise the question distinctly.

I regret that it should be necessary to direct a new trial, but I do not think we are in a position to direct judgment for either party.

Bankes L.J. Whether the appellant is liable in damages for the unfortunate accident to the respondent must depend upon what are the proper inferences of law and of fact to be drawn from the circumstances under which the accident happened.

From the evidence given it appeared that the appellant was lessee and manager of the Theatre Royal, South Shields. He apparently engaged and employed the necessary theatre attendants, but his practice was not to engage the necessary actors or to produce plays himself, but to get theatrical companies to come and perform at his theatre upon the terms that the gross takings should be shared between himself and the proprietor of the company.

On the occasion when the accident occurred the company performing at the theatre was that of a Mr. Watson Mill, who provided and paid all the actors and himself took a part. He also provided the necessary appliances for the performance of the play, the appellant providing only the building, the necessary attendants, and the lighting. The arrangement as to division of gross takings was that the appellant took 60 per cent. and Mr. Mill 40 per cent. The title of the play which was being performed at the time of the accident was "In Time of War," and an incident in the play consisted of the firing of a certain number of pistols by the actors. Three pistols were, I think, used. The blank ammunition to be used in the pistols was apparently supplied by Mr. Mill and was kept by him locked up in a box with the pistols. In some way, not explained, a cartridge too small for the bore of one of the pistols had got into and remained in the barrel of the pistol, and there seem to be only two possible ways of explaining how it got there. It must either have been dropped down the barrel, or have been inserted in the chamber, and, being too small to fit it, must have slipped up the barrel. A cartridge of a proper size must then have been inserted, after which the pistol was fired, with the result that the small cartridge which remained in the barrel acted like a bullet and pierced the plaintiff's arm when she was sitting in the theatre as a spectator.

There was no evidence as to how, or when, or under what circumstances or by whom the small cartridge was inserted in the pistol. As between the appellant and Mr. Mill it seems clear that they were not partners in the production of this play, and that neither the actors, including the person who fired the pistol, nor the person, whoever it was, who loaded the pistol, nor the person, whoever it was, whose duty it was to provide the cartridges, or to see that they were of the proper size, were servants or agents of the appellant so as to make him responsible on that ground for any negligence on their part.

I pass now to consider the relations between the appellant and the unfortunate respondent. They rest entirely upon the fact that she had purchased a ticket of admission to the theatre to witness the play as advertised by the appellant. The position of a person who has purchased a ticket to witness a performance has been recently considered in the Court of Appeal in the case of *Hurst* v. *Picture Theatres, Ld.* (1) The point in that case was whether the plaintiff could be removed at any time at the will of the management on the ground that the admission ticket was merely a revocable licence, or whether he had a right so long as he behaved himself to remain in the theatre and to witness the whole of the performance. It was held that the relations between the parties were contractual relations, and that the contract included an agreement not to revoke the licence until the play had run to its termination. That was all that was necessary for the decision of that case.

The relations of the parties being contractual, the first question which arises in the present case is what were the terms of the contract. There may be cases in which the contract created by the invitation contained in the playbill, followed by the purchase of a ticket, is such that the obligation of the theatre lessee and manager is to produce the performance himself, in the sense that the performers shall be as between himself and the audience his servants, whether they are so in fact or not. On the other hand there may be cases in which the contract is such that the obligation of the theatre lessee and manager is only to procure some independent person or company to produce the performance in the lessee's building. The rights of the other party to the contract appear

(1) [1915] 1 K. B. 1.

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to me to be materially different in the two cases I have put. In the first case the lessee and manager would, in my opinion, bring himself within the principle of the railway cases of which *Great Western Ry. Co.* v. *Blake* (1) is an instance. There Crompton J. in giving judgment said that, having contracted to carry the passenger from A. to B., the railway company took upon themselves all the responsibility of the journey, including that of the negligence of some servant of another railway company over whose line the passenger was carried in pursuance of the contract. In *Dalton* v. *Angus* (2) Lord Blackburn states the same underlying principle in these words: "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor." On the other hand, if the contract be one of the second kind, I do not think that the obligation of the lessee and manager extends beyond the obligation to provide a performance which is not inherently dangerous. The distinction between the two classes of obligation is, I think, well illustrated by the case of *Hall* v. *Lees* (3), where, in discussing the question of the defendant's liability, Lord Collins, then Master of the Rolls, said that the question was whether the defendants had undertaken to nurse the plaintiff's wife, in which case they would be liable for any negligence on the part of the nurse provided by them in the performance of her duties, or whether they had only undertaken to provide a properly qualified nurse, which for the purpose of comparison with the present case I would translate into a safe nurse.

There are no facts in dispute on this question of what the contract was. The learned county court judge does not draw the distinction which seems to me material, as he speaks in one place of the appellant providing the entertainment and in another that he did so by arranging for theatrical companies to come and perform at the theatre. It is for the plaintiff to establish the contract on which she relies. The playbill was put in at the trial as part of the plaintiff's case, and it is upon the contents of that playbill coupled with the issuing of and payment for the ticket that the contract

(1) 7 H. & N. 987. (2) 6 App. Cas. 829.
(3) [1904] 2 K. B. 602.

between the parties must depend. In my opinion these materials are insufficient to create either an express or an implied contract that the entertainment would be provided by the appellant himself in the sense I have indicated above, namely, that as between himself and the persons who purchased tickets of admission the performers were to be treated as the appellant's servants, with the result that he undertook the responsibility for the acts of the performers, or undertook the duty of protecting the audience from acts of negligence on their part. In my opinion the proper construction of the contract is that, in consideration of the payment for her ticket, the appellant undertook that the respondent should have the right to witness an entertainment in the appellant's theatre which would be, or possibly might be, provided by an independent company. What then are the rights and obligations of the parties if the entertainment is provided, as it was in the present case, by an independent company, some member of which was guilty of the negligence which caused the plaintiff's injury ? These rights and obligations may, I think, be best described as being those of an invitee and an invitor as applied to the members of an audience invited to a theatre by the owner or lessee of the building to witness an entertainment there provided by persons who are not in his employ. The duty of the invitor is expressed in general terms by Buckley L.J. in *Norman* v. *Great Western Ry. Co.* (1) in these words : " The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it." It seems to me obvious that the duty of the invitor in a case like the present is not only confined to the state of the premises, using that expression as extending to the structure merely. The duty must to some extent extend to the performance given in the structure, because the performance may be of such a kind as to render the structure an unsafe place to be in whilst the performance is going on, or it may be of such a kind as to render the structure unsafe unless some obvious precaution is taken. As an illustration under the latter head I would instance a case where a tight-rope dancer performs on a rope stretched over the heads of the audience.

(1) [1915] 1 K. B. 592.

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In such a case the provision of a net under the rope to protect the audience in case the performer fell seems so obvious a precaution to take that in the absence of it the premises could not be said to be reasonably safe.

In the present case the performance was one which included a discharge of pistols loaded with blank ammunition as one of the incidents. If the pistols had been properly loaded, it is difficult to see that the incident exposed any member of the audience in any ordinarily constructed theatre to any danger. On the other hand, if any one of the pistols was not properly loaded, what would otherwise be a safe performance became an exceedingly dangerous one, and any part of the auditorium might be rendered an extremely unsafe place to be in. Whether the circumstances were such that any negligence or want of proper care can be attributed to the appellant in relation to the loading of the pistol or in relation to the ammunition supplied for that purpose has not been investigated, and I do not think that justice can be done between the parties until this is done.

A new trial must, therefore, be had in order that the county court judge may investigate the circumstances and come to a conclusion upon them as to whether, in the sense which I have endeavoured to indicate, the appellant did or did not fail in the duty which he owed to the respondent of taking reasonable care that the respondent was not exposed to unusual danger of which he either knew or ought to have known.

*Appeal allowed: New trial ordered.*

Solicitors for plaintiff: *Gibson & Weldon, for T. W. W. Spence, South Shields.*

Solicitors for defendant: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

W. J. B.

## ATTORNEY-GENERAL TO HIS ROYAL HIGHNESS THE PRINCE OF WALES *v.* COLLOM.

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*Feb.* 15, 16, 17;
*April* 3.

*Mines—Duchy of Cornwall—Buildings—Surface Owner—Possession—Equitable Defence—Estoppel—Title—Assessionable Manors Act*, 1844 (7 & 8 *Vict. c.* 105), *ss.* 54, 55, 69.

By virtue of the Assessionable Manors Act, 1844, s. 54, His Royal Highness the Prince of Wales, as Duke of Cornwall, was absolutely entitled to the mines and minerals within certain manors including that of C. Sect. 55 of the Act empowered the Duke, his agents and lessees, to enter upon all lands within the said manors, and all mines belonging to the Duke, and to open and work the same, and to erect all such buildings, machinery, &c., and do all such acts as should be "necessary or convenient for working the same mines," on making compensation to the surface owners. By s. 69 it was provided that it should be lawful for the Duke, his agents and lessees, to pull down and remove all buildings, machinery, &c., no longer used for the purposes aforesaid, or to allow the same to remain, and no buildings should, by non-user or otherwise, be deemed to be abandoned, so as to vest any right or title therein in the owner of the land.

The defendant was the owner by purchase of garden land adjoining two cottages at W. E. in the manor of C., and was also in possession of a house and garden at W. Z., the site of which she had purchased in 1902. This house was subsequently enlarged from one of six rooms into one of eleven rooms, with an additional wing. These alterations and some improvements to the garden cost 500*l.* and were known to the mineral agent of the Duchy, who remained passive. The Duchy claimed that under the provisions of ss. 55 and 69 of the Act the two cottages and land at W. E. and the house and land at W. Z. had been originally erected, entered upon, and used in connection with the mines at W. E. and W. Z. respectively, and were now vested in the Duchy. From 1846 onwards licences and leases had been granted by the Duchy for the working of the two mines, but neither had been in fact worked for many years.

Upon an information by the Attorney-General to His Royal Highness the Prince of Wales claiming declarations of title to the lands and buildings, and an injunction to restrain the defendant from asserting any title to the same:—

*Held*, on the evidence, that the two cottages at W. E. and the house at W. Z. had been originally erected about 1849 under the provisions of s. 55 of the Act as "account" or agent's houses for

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the working of the mines, and that they were "buildings necessary or convenient" for that purpose.

But *held:* (1.) That the effect of s. 55 was not to vest any land in the Duchy, but only compelled the surface owner to permit his land to bear certain burdens, and did not divest him of his title; nor did it follow from the power in that section to erect "buildings" that a power was given to take land for gardens.

(2.) That the effect of s. 69 was not to vest any title in the Duchy, but to prevent the surface owner from resuming full enjoyment of land once taken; and consequently that the Duchy had established no right over, or title to, these lands.

(3.) Following the principle laid down in *Ramsden* v. *Dyson* (1866) L. R. 1 H. L. 129, 140, that in regard to the Duchy's claim to the house at W. Z. the defendant had established a good equitable defence based on estoppel, the expenditure on the house having been made to the knowledge of the agent to the Duchy and on property which the defendant reasonably believed to be her own; and that such equitable defence was good against the Crown.

*Held*, therefore, that in the result the defendant had established her title, and the information must be dismissed.

THIS was an information by the Attorney-General to His Royal Highness the Prince of Wales claiming declarations that certain lands in the Duchy of Cornwall and the buildings thereon were vested in His Royal Highness, and for an injunction restraining the defendant from asserting any right or title as against His Royal Highness to the lands and buildings, and an order directing the defendant to deliver up possession of the same.

The defendant was Elizabeth Mary Beatrice Collom, who carried on a girls' school at North Park House, in the manor of Calstock in the county of Cornwall, and had been in possession of the house and garden ground since the death of her mother in 1889. She claimed title to this house and grounds by purchase of the freehold in 1902, after which date she had expended 500*l.* on structural alterations to and enlargement of the house, and improvements to the garden. The detailed facts and the result of the evidence are taken from the considered judgment of the Court as follows:—

"The premises in question consist of two separate premises situate in the manor of Calstock, within the limits of the Duchy, and known respectively in this case as the Wheal Zion and Wheal Edward premises, deriving their names from mines of those names in respect of which the Duchy claims their title. The Wheal Zion

premises are also known as North Park House. The Wheal Edward premises claimed in this action consist of land coloured green and yellow on the plan attached to the information and comprising about eighteen to twenty perches respectively. No claim is made by the defendant in her answer to the houses or cottages in connection with which the said lands have been used, and, though such claim was at one time made, it was withdrawn by the defendant in a letter to Mr. Peacock, the secretary of the Duchy, dated April 27, 1912. No question as to the title to these cottages therefore arises directly in this action. The Wheal Zion premises consist of a house called North Park House and grounds of about half an acre.

"The rights of the Duchy (which will be a convenient term to describe the interests represented by the informant) to the premises in question were controlled by the Assessionable Manors Act, 1844, and it is unnecessary to set out the history which led to this statute: it is sufficient to say that the Act was passed, amongst other purposes, to settle the title of the holders of certain conventionary tenements within the manors dealt with by that Act, and to secure the Duchy in its mining rights. The premises in question fall within this Act. By ss. 53 and 54 it was declared that all mines and metallic minerals within the lands in question as should by the award referred to in the section be determined to belong to the Duchy did and should belong absolutely to the Duke of Cornwall. By s. 55 it was provided as follows. (1) Then there are provisions for the time within which such notice should be given, and so forth. The succeeding sections provide machinery for ascertaining the compensation for the damage which shall be done by exercising the rights mentioned in this section; and the further remaining important section is s. 69. (2) Licences to work the mine known as Wheal Edward were granted in or about the year 1846, and to work the mine known as Wheal Zion in or about the year 1849. And I am satisfied that the cottages on Wheal Edward, to which reference has been made, and the original North Park House were erected about the time mentioned, possibly a few years later, in connection with the working of the respective mines by the then respective licensees. I think upon the evidence that both the cottages at Wheal Edward and North Park House at Wheal Zion were originally erected as account houses

(1) See note (1) on p. 205, post. (2) See note (2) on p. 205, post.

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to serve as offices at which the men might be paid and the necessary clerical business at the mine be transacted, and also to serve as dwelling-houses for some person connected with the mine, probably the captain or manager, as the licensee should direct. I think that such buildings were necessary or convenient for working the mines and getting, washing, dressing, rendering merchantable, carrying away, and disposing of the minerals.

"The history of the said mines seems to be as follows: As to Wheal Edward, from the year 1846 and practically continuously to the present day licences have been granted to different licensees to work the mine. There have been breaks at times of about twelve months or more at which there has been no licence. The last licensee is one David Barrett, who held a licence to work the mine continuously since 1895. But though licences have been so granted in fact the mine has not been worked for a number of years. From 1855 to 1867 ore was sold each year and the Duchy received dues under the terms of the licence which at one time were substantial, in 1858 reaching 527*l.*, being dues on 7919*l.* of ore sold. In 1867 the ore sold was 133*l.* in value, dues being 4*l.* 8*s.* 8*d.* No more ore was sold except that in 1876 107*l.* worth was sold and in 1878 ore to the value of 13*l.* 19*s.* 2*d.* was sold. Since that date no ore has been sold. The mine buildings, machinery sheds, &c., are ruined and derelict, and in some cases have disappeared. The only buildings which survive are the cottages above referred to, which have been occupied by David Barrett and his brother, to whom David sub-let one cottage at the rent of 4*l.* a year. The land in question has been used and cultivated by David Barrett and his tenant as gardens. David Barrett continuously since his licence in 1895 has carried on at the cottage and on the premises in question his ordinary occupation of sweep, sawyer, and proprietor of a threshing machine. He has never worked the mine, and, having seen him, I am satisfied that he has never had the means or, as I believe, the intention to work the mine. He has never used the ground in question in fact for any purpose in connection with the working of the mine, nor can I find that any of his predecessors have. I am not satisfied that this land was ever used before the advent of Barrett even as a garden, but if it was, the question arises whether such use was authorized by the statutory power to 'erect

buildings' or by the general words 'to do all such other acts and things upon, under, in, and about the lands as shall be necessary or convenient for working the mines.' This point arises also as to the garden of North Park House, and I will deal with it in that connection.

"As to Wheal Zion, licences have been granted to various licensees to work the mines continuously from 1850 to 1885. From 1859 to 1867 the defendant's grandfather, Philip Collom, was either sole or a joint licensee; and from 1868 to 1885 the defendant's father, William Collom, was a joint licensee. The mine was under licence from 1888 to 1899, and also for one year from May 1, 1913. It also has not been worked for a great many years and the mine buildings are ruined and derelict. Part of the materials of the buildings were sold by Captain William Collom in 1877. Ores were sold in the years 1852, 1855, 1858, and in 1863. In 1857 the ores sold were of the value of 240*l.*, in respect of which dues of 16*l.* were paid. In 1863 the ores sold were 66*l.* 3*s.* 2*d.*, on which dues of 4*l.* 8*s.* 1*d.* were paid. Since 1863 no ores have been sold.

"The original North Park House, which, as I have said, was the original account house of the mine, was occupied by successive mine captains, and at one time by the defendant's grandfather, who died in 1866. After his death it was occupied by the defendant's aunts, who kept a schoolhouse there until 1876. The house then remained empty until 1878, when it was occupied by the defendant's father, Captain Collom, who reopened it. The defendant lived there with her father till his death in 1885. On his death-bed he purported to give the house to the defendant. The defendant's mother remained in the house with the defendant until her mother's death in 1889, since which date the house has been occupied by the defendant, who has kept a school there for boarders and day pupils up to the present time. No consent of the Duchy for the defendant's occupation was asked for or given, and I see no reason why it should be implied.

"The original history of the garden surrounding the house is not satisfactorily shown. But before 1870 the site of the present garden appears to have been enclosed by a hedge or fence and to have been used as a garden by the occupiers of the house. About the time of Captain Collom's death the property round the house

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and grounds and the site of the house and grounds were purchased from the then owner by a Mr. Glanvill, and in 1885 Mr. Glanvill claimed rent for the garden from Mrs. Collom, the widow. She was unwilling to pay, and he therefore pulled down the hedge or fence and used the materials towards building cottages, and, as I infer, the site of the garden became part of the adjoining fields. In 1902 Miss Collom, the defendant, bought the site of the house and garden from Mr. Glanvill. She thereupon built a wall around the garden with a gate and pillars, and having fenced the garden proceeded to make substantial structural alterations to the house, including the addition of a wing at the north-east corner. The house was thus converted from a six-roomed house to a house of eleven rooms with a bath-room. A tennis court was also made in the garden and a shrubbery and beds laid out. A substantial sum of money was spent in this way. No exact account was kept by Miss Collom, and the account which had been prepared for her proved to be illusory. But I am satisfied that 400*l.* or 500*l.* has been spent on the alterations, of which about 50*l.* or more would be attributable to the fence and garden. These alterations and additions were made at some time between the years 1902 and 1906. They took some time to complete, and were done openly, and made a conspicuous alteration in the appearance of the house as well as of the grounds surrounding it. They attracted the attention of the neighbours. According to the evidence of David Barrett, a witness called for the Duchy not too favourably disposed to the defendant, the alteration was noticeable from a distance and would be seen from the highway; any one in the neighbourhood could see it. There arose an issue of fact as to whether the fact that the alterations were being made was known to Mr. Richards, the mineral agent of the Duchy, whose duty it is to look after mine buildings. He admitted that he knew all along that Miss Collom was keeping a school on the premises. He must have been repeatedly in the neighbourhood while the alterations were going on, and it is evident from the correspondence that he took a lively interest in the premises at Wheal Edward occupied by Barrett. Mr. Richards was called before me; he is an elderly gentleman and his memory is naturally not very accurate on matters that took place some time ago. Where there is a conflict I prefer the evidence of Miss Collom, upon whose statements I

think I can rely. I am satisfied upon consideration of all the circumstances that at the time that Miss Collom was making the alterations in question at the house Mr. Richards must have been aware that they were being made. I am quite satisfied that Miss Collom made them thinking reasonably that the house and grounds were her property, and I am also satisfied that no one could have been aware that she was making them without also being aware that she was making them in the belief that she was spending the money on her own property."

*Ernest Pollock, K.C.*, and *A. T. Lawrence*, for the informant. The mining rights of the Duchy of Cornwall as against the owner of a conventionary tenement were fully established in the case of *Rowe* v. *Brenton* (1) in 1828, where the right to copper ore was in question. Subsequently the Assessionable Manors Act, 1844, governed the respective rights of the Duchy of Cornwall and the conventionary tenants. We chiefly rely upon ss. 55 and 69 of the Act of 1844 as establishing the title of the Duchy to these lands and houses. Sect. 68 provided that the provisions thereinbefore contained as to the Duke of Cornwall and his lessees making compensation for damage done to the surface of lands and tenements should not apply to any lands or tenements which, at the date of the conveyance of the manors mentioned in the Second Schedule, were waste or demesne lands of the same manors respectively. By s. 73 the claims of the Duke of Cornwall to mines were barred by possession of the land and exclusive working of the mines for sixty years. Our claim is that the cottages at Wheal Edward and the house at Wheal Zion were "buildings" originally erected in accordance with the provisions of s. 55 of the Act for the use of the mine agent or captain, in order to work the mines, and were part of the property of the Duchy. We also say that North Park House and lands were waste and demesne lands of the manor within s. 68 as found by the award under the Act, and no compensation was payable in respect of them. When that mine was no longer worked, the house was occupied by the leave and licence of the Duchy. With regard to the garden land at Wheal Edward claimed by the defendant, these two gardens were "necessary and convenient"

(1) (1828) 8 B. & C. 737.

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for the habitation of the cottages and also formed part of the property of the Duchy. The Duchy therefore has the sole right of user of these lands to the exclusion of the surface owner.

*Whitmore L. Richards*, for the defendant. Upon the true construction of the Assessionable Manors Act, 1844, there is no express provision in any of the sections referred to under which the Duchy could acquire the surface of the land. A right of entry on payment of compensation is provided by s. 55, but there is no sale of the surface. The surface owner's rights were reserved by s. 69, and on the disuse and abandonment of the working of the mine the rights of the surface owner revived: MacSwinney on Mines, 4th ed., ch. xv., p. 451; *Earl of Cardigan* v. *Armitage*. (1) Under the Inclosure Acts Amendment Act, 1859 (22 & 23 Vict. c. 43), in cases where the right to mines was in the lord of the manor, power was given by s. 3 to the lord of the manor to enter upon such mines and to erect various mills, houses, &c., and to do all things necessary or convenient for working the mines and refining the metals, "and for the accommodation of the persons employed therein." In this Act of 1844, where very similar powers are given to work mines, there are no such words as to the erection of buildings for the accommodation of the workers. I submit that only such rights and powers can be exercised by the Duchy as are expressly given by the Act. The defendant claims the eighteen to twenty perches of land used for the two gardens at Wheal Edward; this land, together with a considerable amount of other adjoining land, was purchased by the defendant from J. T. Procter at a public auction in 1910. Compensation was payable in respect of Wheal Edward, but no payment has been proved. As to Wheal Zion and North Park House, assuming these were waste and demesne lands, and that no compensation was payable, still the garden there stood on the same footing as those at Wheal Edward. The house was enlarged upon land bought by the defendant. No rent has ever been paid by the defendant or any acknowledgment of title given, but no plea of the Statute of Limitations is relied on. In no case can the informant recover the additions to the original house built on the defendant's own land, even if the fabric of the original house is held to belong to the Duchy as a mine agent's house.

(1) (1823) 2 B. & C. 197.

Further, I rely on the equitable defence to the action in respect of North Park House, based on estoppel by the conduct of the plaintiff: *Ramsden* v. *Dyson*. (1) The fact of the alterations and enlargement of the house by Miss Collom was known to the mineral agent of the Duchy, who stood by and permitted it to be done. This equitable defence is good as against the Crown: *Attorney-General for Trinidad and Tobago* v. *Bourne* (2); *Plimmer* v. *Mayor, &c., of Wellington*. (3) On the facts here therefore the defendant has a clear equitable claim to the house. [He also referred to *Duke of Beaufort* v. *Patrick* (4); *Ecclesiastical Commissioners for England* v. *Parr*. (5)]

*Pollock, K.C.*, in reply. *Ramsden* v. *Dyson* (6) is distinguishable on the facts. No estoppel can be pleaded against the Crown. There must be very strong evidence that the defendant was encouraged to lay out her money on North Park House. That is not the case here, as the alterations were made without the knowledge of the Duke: *Dann* v. *Spurrier*. (7) Upon the construction of the Act of 1844 the houses erected at both Wheal Edward and Wheal Zion were necessary and convenient for working the mines as agent or account houses, and the gardens were attached to the dwelling-houses: *Dand* v. *Kingscote* (8); *Harris* v. *Ryding*. (9) [Reference was also made to *Attorney-General to H.R.H. the Prince of Wales* v. *St. Aubyn*. (10)]

*Cur. adv. vult.*

April 3. ATKIN J., after stating the facts and evidence as above set out, continued: The Duchy claims in this action that by reason of the provisions of ss. 55 and 69 of the Act of 1844 the land and buildings were vested in His Royal Highness. It does not appear to me that the effect of s. 55 is to vest any land in the Duchy. The Duke of Cornwall and his licensees may enter and build and use all such room for ore and rubbish and do all such other acts and things as shall be necessary or convenient for working the mines, making

(1) L. R. 1 H. L. 129, 140.
(2) [1895] A. C. 83.
(3) (1884) 9 App. Cas. 699.
(4) (1853) 17 Beav. 60.
(5) [1894] 2 Q. B. 420.
(6) L. R. 1 H. L. 129.
(7) (1802) 7 Ves. 231, 235.
(8) (1840) 6 M. & W. 174.
(9) (1839) 5 M. & W. 60.
(10) (1811) Wight. 167.

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compensation for the damage which shall have been done by the exercise of the rights given. So far, I think, the section only compels the surface owner to permit his land to bear certain burdens or be used for certain purposes, and does not divest him of his title. If it stood alone, upon the mines being abandoned the burden would disappear and the surface owner would presumably resume the full enjoyment of his land: see the judgment of the House of Lords on the effect of the special mining customs in the King's Field, in Derbyshire, in *Wake* v. *Hall*. (1) The effect of s. 69 does not appear to me to vest any title in the Duchy, or divest the surface owner of any title, but to prevent the surface owner from resuming full enjoyment of land once taken, at any rate in such a way as to give him any fresh claim for compensation on any re-entry by the Duchy or its licensees.

It was contended, however, that in any case the Duchy had the sole right of user of the land in question, so as to exclude the rights of the surface owner, and reliance was placed on the fact of compensation having been paid. I attach little importance to the question whether compensation was paid or not. If it had not originally been paid, I am satisfied that it should not affect the Duchy's rights after the lapse of years. And if it has been paid, it must be taken to be paid for the damage done by the exercise of the actual legal rights given by the section, whatever they may be. The claim to the lands was based on the contention that there is a right to erect buildings which are necessary or convenient, that it is necessary or convenient that such buildings should include dwelling-houses for the workmen, or at any rate for the agent, that it is reasonable or necessary or convenient that a garden should be attached to such a dwelling-house, and that the lands in question are such gardens attached to such dwelling-houses. I have already held that an account house, such as the buildings in question here originally were, would be included in the word "buildings." I will assume without deciding that dwelling-houses for mining employees, or some of them, would be comprised in the term, but I cannot see that it follows from the power to erect buildings that a power is given to take land for gardens, though no doubt sufficient land may be used to make the power to build effective, and

(1) (1883) 8 App. Cas. 195.

the surface owner could be prevented from using the adjacent land in such a way as to defeat the mining owner's right to build and use an adequate building. I think that the surface owner never lost his full rights over the lands in question, subject to the obligation last mentioned. I think, therefore, that the Duchy have established no title to or right over the lands in question in this case.

As to North Park House, Mr. Whitmore Richards, for the defendant, relied upon the principle expressed by Lord Cranworth in *Ramsden* v. *Dyson* (1): "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights." It appears to me that all the conditions necessary to give rise to this equity exist in this case. Mr. Richards knew the real facts throughout, and, though a doubt was thrown upon his authority, I think that in a case where it can only be contemplated that the Duke of Cornwall can act through agents, the knowledge or conduct of the agent whose special duty it is to look after mine buildings, such as this is, must bind the Duchy. I think the true inference from the facts is that knowing the facts he

(1) L. R. 1 H. L. 129, 140, 141.

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remained passive; I accept the defendant's account of the interview between the defendant and Mr. Richards in 1911 after the expenditure had been incurred.

A further point was raised that no estoppel binds the Crown and that this equity is based upon estoppel. There is authority for the general proposition so far as estoppel by deed is concerned. I know of no authority for the proposition as applied to estoppel in pais. But I think that it is established that equitable defences such as I consider this to be are available against the Crown: see *Attorney-General for Trinidad and Tobago* v. *Bourne* (1); and this very principle laid down in *Ramsden* v. *Dyson* (2) was applied against a claim of the Crown in a decision of the Judicial Committee in *Plimmer* v. *Mayor, &c., of Wellington.* (3) Moreover, though the Crown is interested in the land in question, inasmuch as it reverts to the Crown when there ceases to be a Duke of Cornwall, I think it more than doubtful whether the rule in question would have any application while the rights of the Duchy are vested in an existing Duke of Cornwall. Apart from this defence it appears to me that the Duchy would be entitled to be held to be the owners of the original North Park House, but I am spared, under the circumstances, having to decide the rights of the parties as to the additions made by Miss Collom on land which was her own to a house not hers, built upon land of which the owner of the house had the use but not the title. It was probably not necessary in this action for the defendant to do more than prove that she is in possession, but as some question arose as to the fact of her title it is as well to state that I think from the conveyance and the facts as to the identity of the parcels that the defendant established her title.

It seems to me to be proper to state that after perusing the correspondence I have been struck by the courtesy and consideration shown to the defendant by the Duchy officials in London, and Mr. Peacock in particular, in the course of this dispute. There may have been some unnecessary friction in the country, but in London everything seems to me to have been done to ease a claim which was felt to be a hardship to the defendant, but which the representatives

(1) [1895] A. C. 83. (2) L. R. 1 H. L. 129.
(3) 9 App. Cas. 699.

of the Duchy, holding the views they did as to the legal position, were quite reasonably entitled to make.

In the result the information must be dismissed with costs.

Solicitor for informant: *Robert Ernest Turkes, Solicitor to the Duchy of Cornwall.*

Solicitors for defendant: *Law & Worssam, for Bond & Pearce, Plymouth.*

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NOTE (1).—"And be it declared and enacted, That it shall be lawful for the Duke of Cornwall, his agents and workmen, and his lessees and their agents and workmen, and all persons whom the Duke of Cornwall shall in that behalf authorize, and their agents and workmen, to enter into and upon all lands or tenements of any tenure situate or being within or held of any of the said manors mentioned in the said first and second schedules hereunto annexed, all or any the mines, minerals, stone, or substrata in, upon, under, or of which do or shall belong to the Duke of Cornwall as herein-before is declared and provided, and to search, dig for, open, and work the same mines, and get, carry away, and dispose of the same minerals, stone, or substrata, and to erect all such buildings, steam and other engines, and machinery and things, and sink and make all such pits, shafts, levels, adits, air-holes, tram and other roads, and other works, and to take from the said lands and tenements sufficient stone, lime, and slate for such buildings and other works, and take and use and divert all such water, and take and use all such room for ore and rubbish and other things, and do all such other acts and things upon, under, in, and about the aforesaid lands and tenements, as shall be necessary or convenient for working the same mines, and getting, washing, dressing, rendering merchantable, carrying away, and disposing of the same minerals, stone, or substrata, he the said Duke of Cornwall, or his lessees, or the persons authorized by him as aforesaid (as the case may be), making to the persons entitled to the surface of such lands or tenements, or to such water, adequate compensation for the damage which shall have been done or occasioned by the exercise of the rights, privileges, and easements aforesaid, and making to the persons entitled to the same adequate compensation for the materials so taken as aforesaid . . . ."

NOTE (2).—"And be it enacted, That (subject and without prejudice to the liens, rights, and remedies herein-before given to the persons who may become entitled to compensation for damage as aforesaid) it shall be lawful for the Duke of Cornwall and his lessees, and other the persons authorized by him as aforesaid, and his and their agents and workmen, either to pull down, remove, and take away or fill up all buildings, steam and other engines, machinery, and things, pits, mines, dams, sluices, and works which may be erected or fixed or opened or worked upon any lands and tenements in pursuance of the

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provisions herein-before contained, and which shall be no longer used for the purposes aforesaid, or to allow the same to remain for any time which the Duke of Cornwall or his lessees, or other the persons authorized by him, shall think fit, after the same shall have ceased to be used for the purposes aforesaid; and no buildings, mines, pits, works, or other things shall, by non-user or otherwise, be deemed to be abandoned, so as to vest any right or title therein in the owner of the land, or to give any fresh right of compensation, on the same being resumed or again entered upon and used."

G. M.

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*Dec.* 8, 9, 10, 13, 14;
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*Feb.* 5.

[IN THE COURT OF APPEAL.]

## GLAMORGAN COAL COMPANY, LIMITED *v.* GLAMORGANSHIRE STANDING JOINT COMMITTEE AND OTHERS.

[1911 G. 2066.]

## POWELL DUFFRYN STEAM COAL COMPANY, LIMITED *v.* SAME.

[1911 P. 928.]

*Police—Special Emergency—Constables borrowed from another Police Force—Chief Constable of County—Power to bind County for Maintenance of Constables—Liability of County Council or Standing Joint Committee—County Police Act*, 1839 (2 & 3 *Vict. c.* 93), *s.* 18—*Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 25—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 9, 30, 64.

Riots occurred in connection with strikes of workmen at the plaintiffs' coal mines. The police force of the county being unable to cope with the disturbances, the chief constable, with the authority of the magistrates of the petty sessional division, telegraphed for the military to be sent down, but the Home Secretary instead sent some metropolitan police. The chief constable also made agreements under s. 25 of the Police Act, 1890, with the police authorities of other counties and boroughs for the supply of extra police. These agreements contained provisions for the housing and feeding by the aided authority of the imported police. The plaintiffs, at the request of the chief constable, provided housing accommodation and meals for a number of the police so brought into the county and for the metropolitan police. The standing joint committee, who were the police authority for the county, expressly repudiated liability in respect of the metropolitan police on the ground that their assistance had not been requested. In an action by the plaintiffs against the standing joint committee and the county council

to recover the expenses so incurred by them for housing and feeding the imported police :—

*Held*, (1.) that the defendants were liable for the expenses of housing and feeding the police other than the metropolitan police, the evidence showing either that the chief constable had antecedent authority from the standing joint committee to make the necessary contracts under s. 25 of the Police Act, 1890, for bringing them in and for housing and feeding them, or that the standing joint committee had ratified his acts ; but (2.) that the defendants were not liable in respect of the metropolitan police, the standing joint committee not having asked for their assistance and having repudiated all liability in respect of them.

*Held*, also, by Pickford L.J. and Bray J., that the standing joint committee had power to enter into the contracts so as to bind themselves, and that they were therefore rightly sued upon them, the county council being properly joined as parties to the action as they were the persons who would have to pay the amount found due and against whom an order for payment might be necessary.

By Phillimore L.J. : The contracts were the contracts of the county council though made by the standing joint committee, and the latter were properly made parties to the action as it was convenient that the matter should be decided in the presence of the committee who actually made the contracts.

Observations on the scope and effect of s. 18 of the County Police Act, 1839.

Judgment of Bankes J. [1915] 1 K. B. 471 varied.

APPEALS from orders made by Bankes J. on the trial without a jury of preliminary questions of liability raised on the pleadings in two actions ; reported [1915] 1 K. B. 471.

The actions were brought by the plaintiffs respectively against the Standing Joint Committee of the Quarter Sessions and County Council of Glamorgan, the Glamorganshire County Council, and Captain Lindsay, the chief constable of the county of Glamorgan, to recover certain sums of money expended by them in housing and feeding large numbers of police. The facts may be summarized as follows :—

The plaintiff companies were the owners respectively of collieries in the Mid Rhondda and Aberaman districts of the county of Glamorgan. In November, 1910, there was a serious state of rioting in connection with a strike at the collieries, and the ordinary police force of the county was unable to cope with it. The magistrates in petty sessions at Aberdare on November 5 and the magistrates of the Mid Rhondda division on November 7 resolved

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that it would be necessary to call in the assistance of the military, and left it to the chief constable to determine when actually to apply for it. On the night of the 7th the chief constable telegraphed asking that 100 cavalry and 200 infantry should be sent. In reply the Home Secretary telegraphed on the 8th that infantry should not be used till all other means had failed; that seventy mounted constables and 200 foot constables of metropolitan police would arrive at Pontypridd that evening; that the county would bear the cost; that 200 cavalry would be moved into the district and would remain there pending cessation of trouble, and that the infantry would be at Swindon; but that the military would not be available unless it was clear that the police reinforcements were unable to cope with the situation. About 800 metropolitan police in all were sent down and took an active part in preserving the peace; and the chief constable also introduced large forces of police from various counties and boroughs (called the aiding or general aiding police) to aid those of the county. The aiding agreements under which the police were brought into the county were entered into by the chief constable, and it was provided that the aided county should pay the board and lodging of the aiding police. The chief constable also entered into aiding agreements with the Commissioner of the Metropolitan Police on November 8, 9, and 14, and under those agreements subsistence allowance and lodging had to be provided for the metropolitan police. Mr. Llewellyn, the manager of the Glamorgan Coal Company, at the chief constable's request, entered into an agreement on behalf of the company for the hire of a skating rink at Tonypandy at a weekly rent of 75*l.* for the accommodation of the military; and when the military were not sent some of the metropolitan police and some of the aiding police as well as some of the Glamorganshire police were quartered there. There was no direct request by or on behalf of the chief constable to give the accommodation of the skating rink to the metropolitan or other police, but they were marched there with the knowledge of the chief constable. On November 10 Mr. Llewellyn on behalf of the Glamorgan Company, at the request of the chief constable, made an agreement with a caterer to feed the police at the rink. The Powell Duffryn Company had a large manor-house at Aberaman, used as colliery offices, where they housed and fed at their own

expense twenty-four police on special duty, and on November 5 Mr. Hann, the manager of the company, at an interview with the chief constable told the latter that he would provide accommodation at the manor-house for other police free of charge, but that he would not feed them, which would have to be done at the charge of the county. Thereafter considerable numbers of metropolitan and aiding police were sent there and fed by the company. The claims of the two companies in respect of the expenses so incurred were as follows: By the Glamorgan Company, for meals and other requisites supplied—(*a*) at the rink to the metropolitan police, 4859*l.*; (*b*) to the police who succeeded the metropolitan police in the occupation of the rink, 4587*l.*; (*c*) to police at the different collieries of the Glamorgan Company at which they were housed and fed or fed only, 10,328*l.*; for hire of rink, 3750*l.* By the Powell Duffryn Company, for meals supplied—(*a*) to the metropolitan police, 1538*l.*; (*b*) to the general aiding police and some Glamorganshire police, 484*l.* The expenditure so incurred by the plaintiff companies was, as Bankes J. found, not a voluntary expenditure, but an expenditure incurred at the request of Captain Lindsay and under circumstances which implied a promise of repayment. In making the said requests Captain Lindsay was acting in his capacity of chief constable and believed that he either had or would subsequently in due course get the authority of the standing joint committee for the repayment of the expenditure. The learned judge found that in fact he had no antecedent authority from the standing joint committee of Glamorgan to employ any of the aiding police or to enter into aiding agreements with the police authorities of the various counties and districts from which the said police were drawn, except in one case, that of the police from the county of Somerset, a general authority having been given him to enter into such an agreement with that particular county in the year 1909. (1) The Court of Appeal thought that the evidence pointed to an antecedent authority from the standing joint committee to the chief constable to enter into aiding agreements in case of emergency. But the

(1) This agreement was entered into in consequence of a circular sent on April 14, 1909, by the Home Secretary to all the police authorities recommending them to enter into mutual aiding agreements, and suggesting a form.

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committee knew of the aiding police being so employed, and at their quarterly meeting on December 12 (the committee met quarterly) they appointed a sub-committee to consider what liabilities the chief constable had properly incurred in connection with such police other than the metropolitan police, and authorized them to ratify what he had done if ratification was necessary. However, neither the sub-committee nor the standing joint committee ever formally ratified the chief constable's action, but the judge found that so far as a ratification by conduct could be effectual for the purpose the standing joint committee did ratify the incurring of the expenditure in connection with the police other than metropolitan. With regard to the metropolitan police, the joint committee, on the recommendation of the sub-committee, expressly repudiated their liability, as those police had been sent down by the Home Secretary against their wish in substitution for the military for whom they had asked; and in February, 1911, the metropolitan police were withdrawn. All the aiding and metropolitan police were sworn in as special constables.

The plaintiffs claimed respectively to recover from the standing joint committee and the county council the above-mentioned sums as money expended by the plaintiffs at the defendants' request in pursuance of agreements made by Captain Lindsay on their behalf as their authorized agent; alternatively they claimed declarations that the said respective sums were extraordinary expenditure necessarily incurred by Captain Lindsay in the execution of his duty under the County Police Act, 1839, and that subject to examination and audit of the accounts relating thereto under s. 18 of the said Act they were entitled to have the said respective sums paid by the defendant council out of the county fund; and as a further alternative they claimed a declaration that the said expenditure had been determined by the joint committee to be required for the purposes of the police under s. 30, sub-s. 3, of the Local Government Act, 1888, and that the plaintiffs were entitled to have it repaid to them under that section out of the county fund. The claim against the defendant Captain Lindsay was an alternative claim for damages for breach of warranty of the authority of the other

defendants to incur the expenditure on their behalf in the event of the claim against them being disallowed for want of such authority.

By an order dated May 8, 1914, it was "ordered that the preliminary questions of liability raised on the pleadings in the above consolidated actions be tried, reserving the question of damages to be dealt with as the Court may direct."

Bankes J. held that the plaintiffs had established a right of action against the standing joint committee, and that the county council, who were to provide for payment out of the county fund, were properly joined as parties. He accordingly gave judgment for the plaintiffs as against the standing joint committee and the county council, and for Captain Lindsay.

The standing joint committee and the county council appealed.

The judgment of the learned judge as drawn up (omitting formal parts) was as follows: "Therefore it is adjudged the judgment be for the plaintiffs, and that they recover against the defendants the standing joint committee of the quarter sessions and the Glamorgan County Council the amount of the expenditure (when ascertained as herein directed) incurred by the plaintiffs in respect of all the police (other than the metropolitan police) referred to in the pleadings. And it is further adjudged and declared that all the expenditure incurred by the plaintiffs and referred to in the pleadings in respect of all the police referred to in the pleadings including the metropolitan police was extraordinary expenditure necessarily incurred by the defendant Captain Lionel Lindsay and by the constables under his order in the execution of his and their duty within the meaning of the County Police Act, 1839, and that subject to the examination and audit thereof by the standing joint committee he is entitled to payment thereof out of the county fund, and the Glamorgan County Council are bound to pay the same to him for the use and benefit of the plaintiffs. And it is further adjudged and directed that the Glamorganshire County Council pay the said last mentioned expenditure when ascertained to the said Captain Lionel Lindsay for the use and benefit of the plaintiffs, and that the said Captain Lionel Lindsay pay over the same to the plaintiffs." And it was further adjudged that judgment should be for Captain Lindsay.

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1915. Dec. 8, 9, 10, 13, 14. *Duke, K.C.*, and *Willoughby Williams*, for the standing joint committee. It is the duty of the justices at common law to take the necessary steps to prevent tumults and to preserve the peace: *Rex* v. *Pinney* (1); *Reg.* v. *Glamorgan County Council* (2); and constables are conservators of the peace by virtue of their offices: Lambard's Office of Justice of the Peace, p. 14. The County Police Act, 1839, empowered justices in quarter sessions to establish a county police force, and s. 1 of the County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), made a police force compulsory in every county. By s. 9 of the Local Government Act, 1888, the control of the police was vested in the standing joint committee of the quarter sessions and county council, which was created by s. 30. The standing joint committee is independent of the county council: *Ex parte Somerset County Council.* (3) The Police Act, 1890, s. 25, gives power to the police authority in any special emergency to make agreements for strengthening their police force by constables from another police force, and by sub-s. 3 that power may be delegated to the chief constable. There is no duty on the police authority to make such agreements. By s. 33 and Sched. III. the standing joint committee is the police authority in a county. That power of introducing police from another county was not exercised in the present case by the standing joint committee; the chief constable purported to exercise it without any authority from the committee. The committee never delegated its power in that respect to the chief constable. The delegation must be antecedent to the exercise of the power by the chief constable. By s. 13 of the Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), justices at a special session may order such reasonable allowances to be paid to special constables for their trouble, loss of time, and expenses as shall seem proper. That is the only authority under which the expenses of special constables can be paid. The aiding agreements were made by the chief constable without authority. Nor was there any sufficient evidence that the committee ratified, if they could ratify, his action in making the agreements. The learned judge has not found that the standing joint committee knew of or assented to any promise by the chief constable that the plaintiffs would be paid out of the county fund.

(1) (1832) 3 St. Tr. (N.S.) 2, 11; 3 B. & Ad. 947; 5 C. & P. 254.

(2) [1899] 2 Q. B. 536.

(3) (1889) 58 L. J. (Q.B.) 513.

Knowledge or intention to adopt the act under any circumstances is essential: *Phosphate of Lime Co.* v. *Green* (1); *Marsh* v. *Joseph.* (2) The standing joint committee is a statutory body and its authority is limited by statute, every one having notice of that limitation. Sect. 18 of the County Police Act, 1839, shows how limited the power of the standing joint committee is. These claims cannot be made under s. 18, but if they were the action would have to be against the chief constable, and if he were held liable he might have a claim against the standing joint committee. The chief constable has been held not to be liable. The plaintiffs' claim can only be paid out of the county fund, and the statutory joint committee has no power to direct the county council to pay. The expenses of housing and feeding the police cannot be recovered under s. 18. The expenses were not incurred by the chief constable, and therefore the section has no application. The section was not intended to apply to expenditure on so large a scale as the present. Moreover, the Court cannot deal with the matter; the designated tribunal—the quarter sessions—alone can examine and audit the expenses incurred under s. 18. Nor can the plaintiffs be subrogated to any right which the chief constable may have had against the defendants. Subrogation can only arise in favour of a person who has paid the debt. [*Wolmershausen* v. *Gullick* (3) and *Owen* v. *Delamere* (4) were referred to upon this point.] Nor is the committee estopped by its acts from denying that the police were brought into the county under the statutory powers which the committee had. There is nothing which can support an estoppel in favour of the plaintiffs, and the learned judge has not found any estoppel.

As regards the metropolitan police, the Home Secretary sent them down upon his own initiative, and the standing joint committee, as soon as it heard of the police being sent and of the aiding agreements having been signed by the chief constable, repudiated any liability in the matter. The fact that the metropolitan police were sworn in as special constables under the Act of 1831 does not affect the question. [*Reg.* v. *West Riding County Council* (5) and *Metropolitan Police Commissioner* v. *Hancock* (6) were referred to.]

(1) (1871) L. R. 7 C. P. 43, 56, 57.
(2) [1897] 1 Ch. 213, 247.
(3) [1893] 2 Ch. 514.
(4) (1872) L. R. 15 Eq. 134.
(5) [1895] 1 Q. B. 805.
(6) [1916] 1 K. B. 190.

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The declarations made by the learned judge are not supported by the decision in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1) A. cannot get a declaration that B. is liable to C. To support a claim for a mandamus in an action the plaintiffs must have a cause of action: *Baxter* v. *London County Council* (2); *Smith* v. *Chorley District Council* (3); *Davies* v. *Gas Light and Coke Co.* (4) The remedy is by prerogative writ of mandamus. [*Reg.* v. *Lewisham Union* (5) and Order LIII. were also referred to.]

*Holman Gregory, K.C.*, and *Vaughan Williams, K.C.*, for the county council. The plaintiffs have no cause of action against the county council. There is no privity of contract between them. Sect. 9, s. 30, sub-s. 3, s. 64, sub-s. 3, and s. 65 of the Local Government Act, 1888, show that in these matters of police the standing joint committee acts independently of the county council. The action will not lie against the county council to recover the money, the only remedy, if any, against them being by means of the prerogative writ of mandamus to pay: *Salford Corporation* v. *Lancashire County Council* (6); *Bootle-cum-Linacre Corporation* v. *Lancashire County Council.* (7) The county council could not be sued by the chief constable for his salary; he is appointed by the standing joint committee. There is no obligation on the county council to pay any sum of money in respect of the police until the sum has been determined by the standing joint committee. Sect. 9 of the Local Government Act, 1888, substitutes the standing joint committee for the quarter sessions so far as regards the police.

*Clavell Salter, K.C.*, and *Randolph, K.C.*, for the plaintiffs the Glamorgan Coal Company.

[PHILLIMORE L.J. We are all of opinion that the findings of fact arrived at by Bankes J. cannot be disturbed, and that therefore Captain Lindsay entered into contracts with the plaintiffs for the supply of food and lodging to the police as agent for whomsoever might be liable.]

Sect. 1 of the Special Constables Act, 1831, provides that justices

(1) [1915] 2 K. B. 536, 574.
(2) (1890) 63 L. T. 767, 771.
(3) [1897] 1 Q. B. 532, 539.
(4) [1909] 1 Ch. 248, 258, 259.
(5) [1897] 1 Q. B. 498.
(6) (1890) 25 Q. B. D. 384, 389, 390.
(7) (1890) 60 L. J. (Q.B.) 323, 327.

may, in case of apprehended disturbances, appoint special constables, and s. 13 provides for allowances being made to them. Then came the County Police Act, 1839, which by s. 20 directed that the salaries, allowances, and other expenses of the police force should be paid by the treasurer of the county out of the county rate. Sect. 3 of the County Police Act, 1840 (3 & 4 Vict. c. 88), repealed this last mentioned section, and directed the justices in quarter sessions to make a rate for defraying the expenses of the police in the county. By s. 2 of the County Property Act, 1858 (21 & 22 Vict. c. 92), contracts by justices might be made in the name of the clerk of the peace. That was the position when the Local Government Act, 1888, came into operation. Sect. 9 of this Act gave the control of the police to the standing joint committee created by s. 30. The standing joint committee, which is not a corporate body, is the statutory agent of the county council in the matter of the police, having power to impose contracts upon its principals. The committee makes the contracts with reference to the police, and by s. 30, sub-s. 3, the county council must pay out of the county fund what the standing joint committee determines to be due. The county council are the paymasters. The result of these sections coupled with s. 79, sub-s. 3, is that the standing joint committee takes the place of quarter sessions as the parties to make the contract, the county council being liable on the contract as the real contracting parties. Therefore the county council are rightly sued in this action, and it may be that the standing joint committee are liable on the contract, and they also are properly made parties. Sect. 25 of the Police Act, 1890, recognizes the right of the standing joint committee to contract, the section empowering the police authority, that is, by s. 33 and Sched. III., in a county the standing joint committee, to enter into contracts for assistance from other police forces. The contract need not be in writing, and, as the committee can only contract by an agent, under sub-s. 3 it may delegate its authority to the chief constable. The antecedent authority of the committee is not necessary in order to make such a contract by the chief constable binding on the county. Slight evidence, however, is sufficient to show delegation, as, for instance, that the chief constable made the contract without objection by the committee, who knew that he was doing so.

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With regard to the police other than the metropolitan police, there was evidence of antecedent authority in the chief constable to make the contracts sued upon, and, further, there was strong evidence of ratification. The aiding police became part of the Glamorgan police force, and the chief constable had authority to arrange for housing and feeding them. It was known to the committee that the chief constable was making these aiding agreements, and he was allowed to do so without objection. The conditions stated by Wright J. in *Firth* v. *Staines* (1) as being necessary to ratification existed.

With regard to the metropolitan police, the standing joint committee knew that the police were being employed in the county in restoring order, and the committee used them as part of the county police force instead of sending them back to London. The committee is therefore estopped by its conduct from denying the authority of the chief constable to contract for their housing and feeding. No difference was made between the metropolitan and the other police.

Further, as to all the police, s. 18 of the County Police Act, 1839, applies. The expenses incurred by the chief constable were "extraordinary expenses" within the meaning of that section. There was an emergency which rendered prompt action by him necessary. The section is not confined to cases where the police officer incurs small expenses out of his own pocket. It applies although the officer never comes under any personal liability. It is important to give a wide construction to the section so as to enable the chief constable in times of emergency to act promptly and where necessary to pledge the credit of the county through the standing joint committee. [*Reg.* v. *Chelmsford Churchwardens* (2) and *Reg.* v. *Glamorgan County Council* (3) were referred to.]

With regard to the claim for a mandamus, as the plaintiffs are seeking to enforce a private right, an action for a mandamus is the proper remedy. [*Smith* v. *Chorley District Council* (4) was referred to.]

*Macmorran, K.C.*, and *Hon. M. M. Macnaghten*, for the plaintiffs the Powell Duffryn Steam Coal Company. The contract is with the standing joint committee through its agent, the chief constable, the

(1) [1897] 2 Q. B. 70, 75.
(2) (1843) 5 Q. B. 66.
(3) [1899] 2 Q. B. 536, 548.
(4) [1897] 1 Q. B. 532.

committee, though not a corporate body, having power to contract for housing and feeding the police, just as justices had power to contract; and the committee may adopt the act of its agent within the scope of his authority. The committee under s. 30, sub-s. 3, "determines" what expenditure is required, and the county council thereupon are bound to pay it out of the county fund. It is not necessary to rely upon s. 18 of the County Police Act, 1839, but if it is, *Rex* v. *Leicester Justices* (1), which was decided upon 41 Geo. 3, c. 78, s. 2,—an enactment which is in somewhat similar terms to s. 18 of the Act of 1839—shows that the expenses can be recovered as "extraordinary expenses" incurred by the chief constable.

*Holman Gregory*, *K.C.*, in reply for the county council, and *Willoughby Williams* in reply for the standing joint committee.

*Cur. adv. vult.*

1916. Feb. 5. The following judgments were read:—

PHILLIMORE L.J. I do not propose to state the facts of these cases at length. They have been fully set out by the learned judge in the Court below, and we are all of us agreed, as we intimated during the course of the argument, that there is no reason for disturbing his findings of fact. [The Lord Justice summarized the facts relating to the introduction of the various bodies of police into the county and to the evidence as to housing and feeding them, and referred to the proceedings of the standing joint committee and to the various aiding agreements, and read s. 25 of the Police Act, 1890, under which the aiding agreements were made, and the definition of "police authority" in s. 33 and Sched. III. of the Act, and having stated the form of the claim in each action and the judgment of Bankes J. as drawn up, he continued:]

Both the standing joint committee and the county council have appealed from these judgments, and it appears to me that there are five matters for our consideration: (1.), (2.), and (3.), the authority of the chief constable to bind the county (using the phrase "county" in quite a general way) to pay for board and lodging or lodging of Glamorgan police, of general aiding police, and of the metropolitan police; (4.) the liability of the standing joint committee and of the

(1) (1827) 7 B. & C. 6.

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county council, either or both, to be sued upon a contract made by the chief constable within the scope of his authority; and (5.) the form of the remedy or judgment. First, as to the authority of the chief constable in respect of feeding or housing Glamorgan police. The evolution of the county police has been a gradual one. Under the Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), new or additional powers were given to the justices to appoint and swear in special constables, and by s. 13 the justices for the division may at a special session order reasonable allowances to be paid to special constables for their trouble, loss of time, and expenses, and the county treasurer is to pay on such order. From this probably developed the establishment of paid constables, which was made pretty general by the County Police Act, 1839 (2 & 3 Vict. c. 93), and universal by the County and Borough Police Act, 1856 (19 & 20 Vict. c. 69).

Under the Act of 1839 the justices were empowered to appoint a chief constable, who was to appoint petty constables, and were to provide for their pay and clothing and in some instances for stations and lock-ups, drawing for this purpose upon the county rate. It seems to me that this statute gave them authority to contract either by the chief constable, or by some other agent whom they might select, for all things necessary for the maintenance of their force. Contracts would have to be made with tradesmen for uniforms, probably with builders, and with each policeman for his pay. If it seemed desirable to give a policeman less money and to provide him with lodging, the necessary contracts would be made, and if his pay was given him on the footing that he lived with his wife and family, and then he was on special duty removed to a distant part of the county, his food would have to be given him, and the necessary contract could be made either with him or with an innkeeper. The intermediary would be the chief constable, but his principals would be the justices. In the Act there is a section (s. 18) which has been ridden to death in this case. The appellants have said that, except in respect of pay and possibly uniform, it provides the only way by which the county can be bound, that for all other matters the chief constable must contract so as to bind himself and then seek for repayment from the justices, who are to consider, not what he has bound himself to pay, but what are his reasonable allowances. It

seemed to be conceded that he need not actually make the disbursement before coming for repayment: as to which see *The Feronia* (1); but it was contended that the liability was his, and that there would be no primary contract between the tradesmen supplying and the county. On the other hand the appellants used s. 18 as a warrant for the remarkable form of the latter part of the judgment, suggesting that in some way the Court must determine what are just and proper allowances, or compel the county authorities to determine—and determine rightly—what are just and proper allowances to be made to the chief constable, and then that in some way the tradesmen should be subrogated to the chief constable and given in his name or through him a right of recovery, which he did not seek to exercise.

Now the section is in my mind a very simple and harmless one. It is as follows: "In addition to the salary to be paid to the chief constable of the county, reasonable allowances shall be made to him for extraordinary expenses necessarily incurred by him, and by the constables under his orders, in the apprehension of offenders, and in the execution of his and their duty under this Act; which allowances shall be examined and audited by the justices of the county in quarter sessions assembled." I think it means this: There are expenses which the chief constable—or indeed a petty constable, for the section applies to both—may have to incur on the spur of the moment. He may want to hire a vehicle to pursue an offender, or to carry him to the nearest lock-up or before a justice. He may want, in order to lie in wait for or detect an offender or to bring along a person to identify him, to incur small expenses for hiring a room, or a disguise, or a vehicle. The chief constable may want to transport police and pay their railway fares. And as to some or all of these matters there may not be antecedent authority. The section provides that in such cases the justices may out of the county rate lawfully reimburse the constable. It means no more. It does not limit the powers which the county authorities have of giving an antecedent authority to make contracts. It does not give the person with whom the constable deals on his own credit any right as against the county. And this being so, there is nothing in the section to prevent the county authorities

(1) (1868) L. R. 2 A. & E. 65.

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from giving or being held by the mere virtue of his appointment to give to the chief constable authority to enter into necessary contracts for feeding and housing county police who are moved away from their stations or homes. Therefore question No. 1 is answered, that the chief constable had authority to bind the county to pay the colliery companies, as the county has paid other tradesmen (1), for housing (if there was any housing) and feeding Glamorgan police.

Now 2, as to the general aiding police. The statute of 1890 makes such police, if they have been brought in under a lawful agreement, peace officers and police of the county. The question of the chief constable's power to provide by contract for the feeding and lodging of such police must arise. There can be no question that part of the remuneration of the aiding police must take the form of housing them and feeding them, unless the agreement gives them lodging and subsistence money. Therefore, as regards Somerset police, possibly as regards Bristol, possibly even as regards Swansea, Gloucester, and Cardiff, there is no difficulty. (2) There remain the other counties and cities and boroughs. If there was authority to bring them in they stand on the same footing. The question, therefore, is, was there authority? No doubt the statute states that the police authority is the chief constable empowered by his standing joint committee by general or special order, and there is no recorded order. But the standing joint committee, though I suppose it must be considered so much an association that it must meet to pass resolutions as if its members were capitulariter congregati (see the case of the *Dean and Chapter of Fernes* (3) ), and could not give assent through the separate adhesion of its several members, has yet no rules, or none bearing upon this matter, does not meet except at stated and remote

(1) These payments were authorized by the standing joint committee at their meeting on March 6, though without any admission of legal liability.

(2) It appeared that, upon receipt of the Home Secretary's circular of April 14, 1909, the Glamorganshire Standing Joint Committee entered into negotiations with the police authorities of Gloucestershire, Somersetshire, Bristol, Cardiff, and Swansea for mutual aiding agreements, but only one was entered into, namely, with Somersetshire.

(3) (1607) Davies, 116.

periods, has no provision for summoning special meetings, and must in such matters be taken to authorize either its chairman or its clerk or the chief constable to act in cases of emergency. The action of the sub-committee with regard to Bristol, the language of the chairman with regard apparently to Gloucester, Cardiff, and Swansea, show that formal agreements were not expected. With the exception of London and Hertford none of the agreements show on their face that the chief constable of the aiding county had authority by order of his standing joint committee to make such an agreement, and the authority is quite as necessary for the aiding as for the aided chief constable. In no case does the aiding authority seem to have required any proof that the aided chief constable had authority.

All these agreements spring from the Home Secretary's circular. All appear to be based, with some variations, upon the form of agreement which he suggests, which of itself does not deduce title in the chief constables to make agreements. It may well be that since that circular a standing joint committee which appoints a chief constable, without expressly forbidding him to contract or reserving to itself the power of contracting, must be taken, by the mere fact of appointment, to authorize its chief constable, not to make general agreements, not to make agreements lasting beyond the next meeting of the standing joint committee, but agreements binding in case of an emergency arising between two meetings. The conduct of the standing joint committee is good evidence of ratification if it could ratify. I see a difficulty about ratification because a lawfully introduced aiding policeman gets by the statute the privileges of a peace officer, and I do not understand how he could be without those privileges at the moment, say, of making an arrest, and get those privileges ex post facto to the detriment possibly of the person arrested, by reason of an unwarranted agreement being ratified. But the conduct of the standing joint committee in this case may be good evidence that it had delegated the power to its chief constable, and the facts that when these aiding agreements—other than those with the metropolitan police—were brought to its notice it passed no censure upon the chief constable for making them, and paid, though with a kind of internal protest, the smaller tradesmen's bills, and, what is strongest of all, has paid

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the various aiding authorities, seem to me strong evidence of some order, not indeed written or recorded in totidem verbis, giving authority to its chief constable to make these arrangements in case of emergency.

This being so, the plaintiffs are entitled to recover for lodging and feeding the general aiding police.

The position as to the metropolitan police is different. They were not brought in under an aiding agreement; they were sent by the Home Secretary on his mere motion, and the subsequent agreements made some days after their arrival are mere forms. The Home Secretary gave up the attempt to insist upon them. I have been prepared to go so far as to hold that the standing joint committee might have contemplated and by implication authorized the chief constable to enter into ordinary aiding agreements, but it would be wild to suppose that it ever contemplated an agreement for an introduction upon this scale of a body of substitutes for the military. As soon as ever it was known that there were agreements between the Chief Commissioner and the chief constable, purporting to provide for the employment of the metropolitan police, the standing joint committee repudiated these agreements and any liability for the pay or maintenance of the metropolitan police. It is suggested that they were sworn in as special constables for the county. It may be doubted whether that was regularly done, but, assuming that it was, it would be almost fantastic to treat the application of the present plaintiffs as an enforcing of the right of special constables to have such compensation as is provided for them by the Act of 1831. There can be no direct remedy against the standing joint committee or the county council upon the contract supposed to be made to pay for the board and lodging of the metropolitan police, nor do I think that the judge thought there could be. The form of his judgment and his reasons seem to show this. The ingenious attempt was, however, made on behalf of the plaintiffs to work s. 18 of the Act of 1839 by treating the chief constable as having made himself personally responsible to the colliery companies, giving him an indemnity, and then vesting that indemnity in the plaintiffs by way of subrogation. And this suggestion has commended itself to the learned judge, and results in his judgment in the form which it has taken. But it will not do.

The chief constable did not bind himself. If he had, the judgment should have been given against him. He does not ask for any indemnity. He was a defendant and not a plaintiff, and never sought to be put in any other position.

Questions 4 and 5 may be treated of together. The old county authority—the justices—could by common law make valid contracts. This is shown in the case of *Rex* v. *Inhabitants of Essex.* (1) How they did it in form, and in what name or through whom they could sue and be sued upon such contracts, has not been investigated during the arguments before us, and probably it is needless to inquire. So long ago as 12 Geo. 2, c. 29, justices were given power by s. 1 to make one general rate, to be raised, except in certain places, out of the poor rate and paid to the county treasurer, who by s. 6 was to make payment thereout on the order of the justices. By s. 14 they could contract for rebuilding bridges and similar works, and provision was made for security for due performance being given by the contractor to the clerk of the peace on behalf of the justices. By 19 & 20 Vict. c. 69, s. 22, justices were given power to purchase station houses and strong rooms and to use the Lands Clauses Act, but no provision was made, that I can trace, for nominating any particular person or officer to whom land could be conveyed. It is not unlikely, however, that the clerk of the peace had already been mentioned in some Acts of Parliament as a person with whom contracts could be legally made, or to whom lands could be conveyed.

All this leads up to the statute which was in force till the Local Government Act, 1888, was enacted, and which was in fact only repealed some years later by the Statute Law Revision Act, 1892. This statute (21 & 22 Vict. c. 92) provides by s. 1 that conveyances of land which the justices are authorized to purchase shall be made to the clerk of the peace upon trust for the public uses and purposes for which it is bought, and by s. 2 that except where otherwise specially provided for by any Act of Parliament contracts entered into by the justices shall be made on their behalf by the clerk of the peace, amd may be sued upon by or against the clerk of the peace for the time being. In these circumstances the Local Government Act, 1888 (51 & 52 Vict. c. 41), by which the general government

(1) (1792) 4 T. R. 591.

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of the counties was transferred from the justices to the county council and the standing joint committee, was passed. The material sections are 9, 30, and 64. [The Lord Justice read the sections.]

It results that the county council can make contracts, and can sue and be sued in respect, at any rate, of such matters as would not come within the cognizance of the standing joint committee, and that the standing joint committee can either itself enter into contracts or direct the county council to enter into contracts for the standing joint committee. But as the standing joint committee is not a body corporate and has not a common seal, it seems to me that all contracts requiring to be under seal and all conveyances by or to the county authorities must be made by or to the county council. I gather from the judgments of my colleagues that we are not quite in agreement on this point. They think that the contracts are the contracts of the standing joint committee. I think that the Legislature intended in the Act of 1888 to follow the principle of the Act 21 & 22 Vict. c. 92, and that, as the unincorporated justices could make contracts through and sue or be sued by their clerk of the peace, so it was intended that the unincorporated standing joint committee should make contracts through and sue or be sued by their county council. I am somewhat assisted by the Police Act, 1890. This Act enabling police authorities to make agreements must have intended that those agreements should be enforceable, and one would think directly enforceable, by ordinary process of law. Now the watch committee is the police authority in boroughs for the purposes of this Act; and the watch committee is a mere committee of the town council, a necessary committee where the borough has its own police, but not more necessary than the finance committee, the existence of which is also required by statute. Both are pieces of internal organization, having no separate existence apart from the corporation and no funds. The Legislature never, I think, meant that disputing watch committees should sue or be sued, in order to get a formal judgment, fruitless except as the basis of some ulterior procedure. I think it is intended in that statute that the corporation should be the parties to the action; and if for instance the police authority of Bristol had occasion to sue on its agreement,

it would sue by the corporation of the city and sue the county council of Glamorgan. It seems to me, therefore, that these actions were rightly brought against the county council.

I have more difficulty in understanding the joinder of the standing joint committee as a defendant or defendants. But on the whole I think it a convenient course that an action upon a contract made by the directing mind of the standing joint committee, even if through the county council as the actual contractor, should be decided in the presence of the standing joint committee. The standing joint committee has to determine, and its determination binds the county council. Though the form of the writ is peculiar, enumerating as it does all the members of the standing joint committee by name, no relief is prayed against these members in their private capacity; and after appearance and defence it is not open to the standing joint committee or its members to contend that the standing joint committee is not a suable entity. Paragraph 18 of the defence does not go far enough for this. My colleagues, I gather, think that the standing joint committee is the primary party to be sued, but that the action is also rightly brought against the county council. We all therefore agree that both are proper parties, and we agree to the form of the judgment. Why, as the two bodies agreed in resisting the claim, it was thought necessary to defend separately I do not see, nor, I think, do any of us.

Upon the whole I think that the actions succeed as regards the claim for housing and feeding all the police other than the metropolitan police and fail as regards the metropolitan police. I think that the orders or judgments of the Court below must be varied, and that the proper form of order for this Court to make in either action is as follows: Allow the appeal, vary order of the Court below. Decide in favour of the plaintiffs against the defendants, the standing joint committee and the county council, on the questions of liability raised on the pleadings so far as these relate to police other than metropolitan police, and against the plaintiffs and in favour of the said defendants so far as these questions relate to the metropolitan police. Declare that the defendants the standing joint committee are liable for the expenditure incurred by the plaintiffs as in the pleadings mentioned in respect of the police other than the metropolitan police, but not in respect of the

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metropolitan police. Refer the claim of the plaintiffs to an official referee, unless otherwise arranged, to ascertain the true amount thereof. Direct judgment to be entered in favour of the plaintiffs against the said defendants for the amount when ascertained. Order that the costs in the Court below be plaintiffs' in any event, and that the costs of the reference abide the order of the official referee and that there be no costs of this appeal. Order the defendant county council to pay the claim of the plaintiffs when so ascertained and all costs awarded to them.

I cannot part with this case without expressing my opinion that this dispute is due to the action of the Home Secretary, and my regret that in haste and apparently with imperfect knowledge of the law, or under erroneous legal advice, he should have taken the steps and made the representations which he made. Nor can I pass over the contention frequently made in the course of the proceedings that it was the duty of the plaintiffs to protect themselves against rioters. Such a contention strikes at the basis of all civilized society and logically leads to private war. The subject pays rates and taxes to insure himself protection against domestic as well as foreign foes, and it is the duty of the Government to provide him with it.

The result of this matter is, unless Parliament takes steps to recoup those who have had to bear burdens which should never have been imposed upon them, that the colliery companies as to part, and apparently the ratepayers of the metropolis as to the rest, have to defray expenses which should properly be borne by the Exchequer.

PICKFORD L.J. These two actions were brought against the Glamorganshire Standing Joint Committee, the Glamorganshire County Council, and Captain Lindsay, the chief constable of Glamorganshire, to recover the cost of housing and feeding the extra police who were brought into the county in consequence of the great coal strike in 1910. The facts are set out in great detail and with great clearness in the judgment of Bankes J., who tried the case, and it is not necessary to do more than state them very shortly so as to make this judgment intelligible. So far as there was a dispute of fact I accept the findings of the learned judge as being correct. [The Lord

Justice shortly stated the facts, in the course of which he said that the members of the standing joint committee knew quite well that police had been imported from other districts and that they had to be housed and fed. With regard to the metropolitan police, they might have been in some doubt as to who would have to pay for them, as the chief constable had not asked for them, but for the military, whose expenses would not be chargeable to the county. But with regard to the other police it was difficult to see how any member of the committee could think that the county would not have to pay for them except on the untenable ground which they afterwards alleged, that if the police were needed for the protection of any person who was a party to the dispute out of which the strike and consequent riots arose he must pay for them himself or go without them.]

I think the result of these facts is that the county authorities knew quite well that the plaintiffs had incurred and continued to incur this expense on the footing of being repaid by the county any part of it which ought fairly to be considered a police expense chargeable to the county. The standing joint committee held a meeting on December 12, 1910, and appointed a sub-committee to deal with claims in respect of the police. The sub-committee and the standing joint committee held other meetings after that time, and the result was that they repudiated the aiding agreements made by the chief constable in respect of the metropolitan police and all expense connected with them, and accepted responsibility for the other aiding agreements and the expenses of the aiding police, with the exception of the amount claimed by the colliery companies, which they refused to pay. Their reason for repudiating any liability in respect of the metropolitan police was that no one had asked for them, but the magistrates had asked for an assistance which they considered would have been more effective and would not have been chargeable to the county, and that if the Home Office sent something not asked for which they considered less effective the Home Office could not ask the county to pay for it. I do not consider that it is for me to express any opinion as to whether the action of the Home Office in sending metropolitan police instead of soldiers was judicious or not, but I think the position of the standing joint committee was sound that as they had not asked for them they could not be held liable to pay for them. Eventually

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most of the expense of these police was paid by the Government without admitting liability, with the exception of the amounts claimed by the colliery companies, which they declined to pay. I have no information as to why this distinction was made.

The ground on which the standing joint committee refused to pay the plaintiffs' claim appears in a minute of June 26, 1911, and a letter from their clerk to the secretary of the Glamorgan Coal Company of June 28, 1911. The minute is in these terms: "The sub-committee directed the clerk to write repudiating any liability to pay any part of the above claims and to inform them that if they expect more than the ordinary protection that the police force of the county is able to give to their property the committee expects them to do something on their part to protect their special property and interests." The letter was in these terms: [The Lord Justice read the letter in which the committee stated that they declined to pay the sums claimed, and stated that, with regard to the intimation that the company could not continue to provide for the lodging and maintenance of the police specially engaged in protecting the colliery premises, the committee considered that it was incumbent on the owners of property to take reasonable precautions for its protection at all times, but most especially when disturbance of the peace was anticipated as a result of ill-feeling that had arisen between such owners and a numerous body of the inhabitants of the district in connection with the contractual relations between them; that the committee had imposed upon the ratepayers of the county a burden of very large amount in providing men to guard the property of the company, and they considered that the share of the exceptional expenses which the company had hitherto incurred in lodging and maintaining some of these men who were more particularly stationed for the garrison or defence of the collieries was not more than a moderate discharge of the company's duty of protecting their property. The Lord Justice pointed out that the letter was not accurate if by police specially engaged in protecting the colliery premises they meant specially requisitioned for that purpose. The police had not been sent to the plaintiffs' collieries as special police engaged by the plaintiffs, but as the result of a meeting of the authorities, at which these places were pointed out as the most vital points in the collieries which needed protection.]

The position taken by the standing joint committee seems to me entirely untenable and was not insisted on before us. They are the police authority and have to make proper police arrangements to maintain the peace. If one party to a dispute is threatened with violence by the other party he is entitled to protection from such violence whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense in addition to the contribution which with other ratepayers he makes to the support of the police is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly. There is a moral duty on each party to the dispute to do nothing to aggravate it and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty. The Glamorgan Coal Company did take some steps to protect themselves, but I have no information as to their extent. As I have said, the ground for non-payment alleged by the standing joint committee was not insisted on; indeed before Bankes J. the chairman of the standing joint committee stated that they were willing to pay all expense except that voluntarily undertaken by the plaintiffs, and one main contention at the trial was that all the expense claimed in this action had been so voluntarily incurred. This was decided against the defendants by the learned judge, and his finding was not questioned before us, but the defendants still refused to pay on the ground that they had no power legally to do so.

The defendants on these facts seem to me to have no defence on the merits except as to the metropolitan police. With regard to the other aiding police, they have accepted the aiding agreements made by the chief constable, they knew perfectly well that those police were in the county at the invitation of the chief constable and that under those circumstances the expense of housing and feeding them ought to fall on the county, and the request to the plaintiffs to house and feed them was made by the chief constable. If they cannot escape by virtue of some technicality arising from their statutory position they clearly ought to pay. I do not think they are liable for the expense of the metropolitan police on the short ground that those police were not brought into the county by them or by any one

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for whom they were responsible; they were sent by the Home Secretary, and the aiding agreements made by the chief constable were made by him without authority. He knew the provisions of the Act of Parliament under which such agreements were authorized, and he knew that these police had not come into the county under those provisions. I have no doubt he acted for the best in the difficult position in which he was placed, but I think he acted without authority.

I do not think that the defendants are liable for the whole of the rent of the skating rink. It was taken at the request of the chief constable, but for the military, for whom the county were not liable to pay, and when it was used for the metropolitan police to the knowledge, I assume, of the standing joint committee, it was used for a purpose for which the county were not liable. I do not think that the fact that the standing joint committee knew that it was used for police in respect of whom they denied liability can make them liable for the rent, and I think the same remark applies to their knowledge of the feeding of the metropolitan police. If it were used for Glamorgan or other aiding police, then, subject to the legal points to be discussed, I think the plaintiffs are entitled to something for such use.

This leaves only the question of the aiding police and those belonging to the county of Glamorgan. If the chief constable had authority to bring the aiding police into the county and to make the aiding agreements, these two forces are on the same footing, because under s. 25 of the Police Act, 1890, the aiding force are to be deemed part of the aided force. I think he had such authority. By sub-s. 3 of that section the police authority can delegate their power of making an aiding agreement to the chief constable by general or special order, and such general or special order is not required to be in writing or in any particular form. I think there is evidence upon which it can rightly be found that the standing joint committee in this case had delegated that authority to Captain Lindsay in case of emergency arising between its meetings. The chairman was clearly of that opinion, although he founded his opinion upon a resolution of 1909 which does not seem to go so far as he thought. When these agreements came before the standing joint committee no suggestion was made that the chief

constable had in any way exceeded his authority, and the standing joint committee acted upon them and paid the other police authorities the sums due under them. I think this authority also extended to obtaining the food and lodging which was part of the obligation under the agreements, for in none of them was there any agreement that the sums mentioned therein should include food and lodging; in some they were expressly excluded, and under all of them the aiding force became part of the aided force, and had to be supported, like them, by the county of Glamorgan. It was not denied that there was ample evidence of ratification if the standing joint committee could ratify, but I agree with Phillimore L.J. that the chairman's evidence and the facts stated pointed to an antecedent authority having been conferred on the chief constable to bring aiding police into the county in an emergency and to make the necessary arrangements for the fulfilment of the resulting obligations of the county.

This only leaves the question whether under the statutes the standing joint committee or the county council can be sued upon the agreements made by the chief constable. If, as I think, he had created an obligation upon the county to pay, the question of whether it can be enforced by action or otherwise is purely technical, and would, I think, never have been raised but for the fact that the defendants were unwilling to pay for the untenable reason which I have already mentioned. Still, if it is a good point they are entitled to the benefit of it. The standing joint committee is a statutory body, and its duties and liabilities are in substitution for those of the justices before the Local Government Act of 1888. Before that Act the justices under various statutes, chiefly the County Police Act, 1839, and the County and Borough Police Act, 1856, were the police authority, and were charged with the duty of supporting the police force. In order to discharge this duty they could and did make contracts for buildings, clothing, &c., for police purposes, and by s. 2 of 21 & 22 Vict. c. 92, except where otherwise provided for, contracts were made on their behalf by the clerk of the peace, and he could sue or be sued upon them, payment being made out of the county fund. In 1888 the Local Government Act, s. 9, transferred these powers, duties, and liabilities to the quarter sessions and county council jointly to be exercised by the standing

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joint committee. By s. 30, sub-s. 3, any matter relating to the police shall be referred to and determined by them, and any expenditure which they determine to be required for the purposes of such matter shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly. It seems to me that if the duties and liabilities which required the making of contracts before are transferred to the standing joint committee there must be implied a power of contracting, and this is consistent with s. 25 of the Police Act, 1890, which gives them the power of making a particular kind of contract. It cannot, I think, be a correct construction of this legislation that the standing joint committee had no power of contracting except in the one instance mentioned in that Act. It was necessary to give them that power expressly, because it extended beyond the support of their own police.

A more difficult question is who is bound by a contract made by them. They are not an incorporated body, and it could not have been intended that the members should be personally liable, and they have no seal under which they can contract when a seal is required. In ordinary cases no difficulty arises. The standing joint committee indent, so to speak, for what they want, and the necessary contract is made by the county council, who cannot object to the requirements of the standing joint committee, but there is no provision in the Acts that the county council shall be a party to all their contracts as the clerk of the peace was a party to those of the justices. I think that the agreements mentioned in s. 25 are intended to be contracts of the standing joint committee on their own behalf and not as agents for the county council, and if that be so I think that this section, considered in connection with the latter part of s. 30 of the Local Government Act, 1888, points to all contracts made by the standing joint committee being their contracts, payment for which is to be made by the county council. I think that when the standing joint committee made a contract by doing so they determined the proper expenditure under that contract, which must be ascertained in case of dispute by the ordinary tribunals to be necessary expenditure, and the county council must pay it, but that the contract remained that of the standing joint committee. The question is not, in my opinion,

very important, as the same result is obtained in each case, and the only difference is that the form of recovery is by means of a declaration that the standing joint committee are liable for the amount and an order on the county council to pay it instead of by means of a direct judgment against the county council.

The result is that the plaintiffs are not in my opinion entitled to recover anything in respect of the metropolitan police, but they are entitled to recover such sums as may be found to be the expenditure incurred in housing and feeding the Glamorgan police and the aiding police other than the metropolitan by reason of the request made by the chief constable. Some of the expenditure was said to be for meals supplied, not in consequence of that request, but generally and casually, and if this be so that should not be recovered.

I have not discussed s. 18 of the County Police Act, 1839, upon which there was so much discussion before us, because I think it deals with matters quite different from those before us. It really only provides that the chief constable is not to be out of pocket by reason of having either by himself or the constables under him to make certain necessary expenditure for police duties, and has no relation to a case where expenditure has been incurred by reason of such a request as he has been found in this case to have made. I have also not considered what his position might be with regard to his request to house and feed the metropolitan police. Judgment has been given for him in the action, and there is no appeal against that judgment.

I think the plaintiffs were justified in joining the county council as defendants. If they decline to pay it is necessary to get an order on them to pay, and I think it was convenient to have that question as well as the liability of the standing joint committee decided in one action, but I can see no reason for the two bodies being separately represented. The questions to be determined as against the two defendants are exactly the same and could have been contested on behalf of both by the same solicitors and counsel.

I agree with the terms of the order and the terms as to costs mentioned by Phillimore L.J.

BRAY J. These two actions were brought to recover moneys expended by the two plaintiff colliery companies in housing and

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feeding police during the coal strike in Glamorganshire, which commenced in November, 1910, and lasted for many months. There were three defendants—the standing joint committee of the Glamorgan Quarter Sessions and the Glamorganshire County Council, the county council, and Captain Lindsay, the chief constable of the county. The exact relief claimed it is not necessary to discuss at present. By an order made in the action it was ordered that the preliminary questions of liability raised on the pleadings should be tried first. The trial took place before Bankes J. without a jury. Against the first two defendants he decided all questions of liability in favour of the plaintiffs. As against Captain Lindsay he held he was under no liability. I shall have to consider the form of the judgment as entered later. It is unnecessary to state the facts which give rise to this claim. They are stated fully, and I think quite correctly, in the learned judge's judgment. His findings of fact also clearly appear in the judgment, and with regard to these we intimated during the argument that we accepted them as correct. I think they are justified by the evidence, and indeed they were not really disputed by the appellants' counsel. The decision was questioned on points of law. There is, in my opinion, no distinction to be drawn between the two actions. In order to succeed against the first two defendants the plaintiffs had to establish the following propositions:—1. That Captain Lindsay requested the plaintiffs to expend these moneys under circumstances which created an implied promise to pay. 2. That Captain Lindsay in making this request purported or intended to act as agent and on behalf of the standing joint committee. 3. That the standing joint committee had power to authorize Captain Lindsay to make this contract on their behalf. 4. That they did give him such authority, or if they did not they afterwards ratified his acts or are estopped from denying that he had such authority. If these propositions are proved either the standing joint committee or the county council or both are, in my opinion, liable. Again I reserve the question of the form of the judgment.

A broad distinction has to be drawn between the money expended in reference to the metropolitan police and the money expended in reference to the other police. I will deal first with the latter. As to point 1 the learned judge has found in terms for both plaintiffs. The appellants' counsel did not dispute these findings. With regard to

point 2 the learned judge found that the county were not mentioned as the authority who would pay in the conversation at which the requests were made, but with regard to the conversation with Mr. Hann, the manager of the Powell Duffryn Company, on November 5 the learned judge finds as follows: "So far as the conversation related to the police, I am satisfied that Captain Lindsay made the statement he did in his character as chief constable and believing that he had or would in due course get the authority of the standing joint committee for any expenditure that was incurred, and I am also satisfied that, when he directed that any particular body of police (including the metropolitan police) should occupy the Aberaman house accommodation, he was also acting as chief constable and under the same belief." In dealing with the conversations between Captain Lindsay and Mr. Llewellyn, the manager of the Glamorgan Company, there is a similar finding of the learned judge. In my opinion these are findings that Captain Lindsay purported or intended to act as the agent of the standing joint committee although there was no direct reference made in the conversations to the county. What was in Captain Lindsay's mind the finding clearly shows, and it was demonstrated by the fact that at this time Captain Lindsay was entering into written hiring agreements on behalf of the standing joint committee with other police authorities binding his committee to pay. What was in the mind of the managers of the collieries is shown by the action they took in sending in accounts. Indeed, so far as the police, other than the metropolitan police, are concerned, there could be no other person or body on whose behalf Captain Lindsay could be acting. I think, therefore, the plaintiffs proved point 2.

Point 3 is a question of law, and it was the point mainly argued on behalf of the defendants. It was said that the standing joint committee were a body created by statute, and could have no powers other than those expressly given them by the statute, and s. 18 of the County Police Act, 1839, was referred to as confirming this view. It was said that they had no power to contract, but they might pay the chief constable the reasonable allowances for extraordinary expenses necessarily incurred. The standing joint committee were created by the Local Government Act, 1888, s. 30, and by s. 9 it was enacted that the powers, duties, and liabilities of quarter sessions

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and of justices out of session with respect to the county police should vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council appointed as thereinafter mentioned. By the interpretation clause, s. 100, the expression "powers" includes "rights, jurisdiction, capacities, privileges, and immunities." The "capacities," therefore, of quarter sessions with respect to the county police have to be exercised through the standing joint committee. If, therefore, quarter sessions had the capacity to make contracts with respect to the police, it seems clear that that capacity rested in and attached to quarter sessions and the county council jointly, and had to be exercised through the standing joint committee. I again postpone the consideration of the question whether such contracts were to be in the name of the standing joint committee, or in the name of the county council, or in the joint names of quarter sessions and the county council. In any event it would seem that the standing joint committee would be the body to negotiate the contracts.

Now had quarter sessions at the time of the passing of this Act (1888) the capacity to make contracts with reference to the police? They had power to appoint a chief constable (see s. 4 of the County Police Act, 1839), they had power to provide station houses and strong rooms (see s. 12 of the County Police Act, 1840 (3 & 4 Vict. c. 88)), and by the County and Borough Police Act, 1856, they were empowered to purchase lands for that purpose. It was their duty to supply the police with uniforms, accoutrements, &c. It would have been impossible for them to exercise such powers and to perform such duties unless they had the power of making contracts. It does not seem open to doubt that quarter sessions could make contracts. It follows, therefore, that the standing joint committee could exercise that same power or capacity. Further, by s. 25 of the Act, 1890, express power was given to them to make aiding agreements. These agreements would or might involve making contracts for the housing and feeding of the aiding police. There is nothing in s. 18 of the Act of 1839 to negative or limit this power. It was obvious that extraordinary expenses might have to be incurred by the chief constable in carrying out his duties without the opportunity of obtaining instruction

from quarter sessions, and the object of s. 18 was to enable quarter sessions to reimburse him for such expenses. In my opinion the standing joint committee had the capacity to make and ratify the contracts which Captain Lindsay purported or intended to make on their behalf.

The fourth and last point is whether the standing joint committee had not in fact given Captain Lindsay the authority to make the aiding agreements and to contract with the plaintiffs to house and feed the police. The learned judge, after setting out the facts, said: "It appears to me that the only possible inference to be drawn from these facts is that either all parties considered that power had been delegated to the chief constable to enter into these aiding agreements or the standing joint committee approved of his action and so fully and so entirely treated it as a matter of course that he should enter into these agreements that no reference to them was necessary unless they were for some reason disapproved of." I entirely agree with this finding. [The learned judge also referred to two passages in the judgment of Bankes J. (1), the first beginning "I am satisfied with regard to all three classes," and ending "should be paid by the police authority"; and the second, "As ratification relates back," and ending "housing and feeding the police."] I think it is not material to inquire whether the authority had been given antecedently or was ratified by conduct afterwards. I think perhaps the evidence points rather more to an antecedent authority than to a ratification. The whole conduct of the standing joint committee is overwhelming to show one or the other, and the appellants' counsel were obliged to admit that if it were the case of a private person instead of a public body ratification could not be disputed. I know no distinction between a private person and a public body in such a case provided always that the public body has the power to contract and that power is not limited by provisions requiring that it shall be exercised in a particular way. I may observe that no point was raised in the pleadings or before us that the power had to be exercised in any particular way. As I thoroughly agree with these findings of fact of the learned judge, and as I have no doubt as to the power of the standing joint committee to make the arrangements which Captain

(1) [1915] 1 K. B. 480, 481.

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Lindsay made or purported to make on their behalf and to ratify them if originally made without authority, it follows that the standing joint committee are liable (subject of course to an inquiry as to the amount in each case) to the following claims of the Glamorgan Company, namely, 4587*l.* for meals and other requisites supplied to the police who succeeded the metropolitan in the occupation of the rink; 10,328*l.* for meals and other requisites supplied to the police at the different collieries of the Glamorgan Company at which they were housed and fed, or fed only; and for so much of the 3750*l.* for hire of the rink as is referable to the police other than the metropolitan police. Mr. Duke raised a separate question as to the 10,328*l.*, but this, I think, is clearly covered by the learned judge's findings of fact. On the same grounds the standing joint committee are, in my opinion, liable to the claim of the Powell Duffryn Company for 484*l.* subject to the inquiry.

I come now to the much more difficult question of the plaintiffs' claims in respect of the metropolitan police. The learned judge has found that the defendants are liable in respect of these, but on a different ground from that on which he held them liable for the other police. He has found that they were extraordinary expenses necessarily incurred by the chief constable within s. 18 of the County Police Act, 1839, and although the chief constable has not paid them nor been held liable for them in these actions, he held that the defendants could be ordered to pay them to the plaintiffs. Having all parties before him, he was of opinion that the order could be made to avoid circuity of action. I cannot agree with this. The only cause of action that the plaintiffs can have against the defendants is in respect of money paid under an implied contract by the defendants to repay. Sect. 18 creates no privity between the plaintiffs and the defendants. In my opinion the plaintiffs' claim can only succeed if they show that the defendants are responsible for the request made to the plaintiffs by the chief constable. The plaintiffs have to prove the same four points that they had to prove in the case of the other police. I proceed, therefore, to consider how far they have proved them. As to 1, the learned judge has found that the implied promises made by the chief constable to Mr. Hann and to Mr. Llewellyn covered the feeding and providing for the metropolitan police. As to 2, again

the learned judge finds that the promises both to Mr. Hann and to Mr. Llewellyn were made by Captain Lindsay in his character of chief constable and believing that he had or would in due course get the authority of the standing joint committee for any expenditure that was incurred. In my opinion these findings are right and justified by the evidence. [The learned judge referred to the evidence upon this point.]

I come, therefore, to the conclusion that the plaintiffs have proved points 1 and 2, and have established a promise to pay for the housing and feeding of all the police (including the metropolitan police) by Captain Lindsay acting as chief constable and purporting and intending to act on behalf of the standing joint committee. I have thought it right to indicate why I think the learned judge was right in coming to this conclusion, because it is an important finding.

Point 3: What I have already said as to this point, which is whether the standing joint committee had the capacity to contract, applies equally to the metropolitan police. Sect. 25 of the Police Act, 1890, applies to all police forces, including the metropolitan, the police authority in that case being the Home Secretary. In my opinion the standing joint committee could contract for the housing and feeding of the metropolitan police as well as any other police.

It remains, therefore, to consider point 4. Now I do not think it can be taken that the chief constable had any antecedent authority from the standing joint committee as regards the metropolitan police. He had not asked for their assistance. He had asked for military, and the Home Secretary had sent the metropolitan police down without consulting him or obtaining his consent. It was an exceptional position, and an authority to make aiding agreements with neighbouring police authorities would not cover it. Equally I think it cannot be said that the standing joint committee intended to ratify the acts of the chief constable in relation to the metropolitan police. The only way in which it can be put is that by their conduct they are estopped from denying that they authorized or ratified his acts.

I come, therefore, to the question whether there was an estoppel. [The learned judge said that he had felt great doubt on this point, but on a full consideration of all the circumstances he had come to the conclusion that qua the metropolitan police the plaintiffs had

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not proved that the committee knew or ought to have known the true facts.] Bankes J. has not found an estoppel, and I cannot find one. I think the appeal succeeds on the question of the liability of the standing joint committee in respect of the cost of the feeding and housing of the metropolitan police.

The last question is what should be the form of the judgments in favour of the plaintiffs as regards the claims in respect of police other than the metropolitan police, and whether it should be against the standing joint committee or against the county council or both. This must depend partly on whether the promise made by the chief constable was a promise made on behalf of the standing joint committee or on behalf of the county council. The chief constable was not the servant or agent of the county council and was not purporting to act as such. In my opinion the promise was made on behalf of the standing joint committee, and it was their contract and not the contract of the county council. First there is s. 9 of the Act of 1888, to which I have already referred. The powers of justices with respect to the county police are to vest in and attach to the quarter sessions and the county council jointly. They are to be exercised through the standing joint committee. If I am right in holding that "powers" includes the capacity to contract, I think the contract must be either the contract of the standing joint committee or the joint contract of quarter sessions and the county council. It seems impossible to suppose it was to be a joint contract. I think it was the standing joint committee who were to exercise the power of contracting, and the contract would be their contract. I think s. 30, sub-s. 3, confirms this view. If the contract were to be a contract of the county council the latter part of the section would be unnecessary and inapplicable. The meaning of this is, as Cave J. in *Ex parte Somerset County Council* (1) put it, that the county council have to pay the bills of the standing joint committee. The latter would have no bills if they could make no contracts. We were referred to s. 64. In my opinion there is nothing in that section inconsistent with the view I have taken. All property and liabilities, which mean existing property and liabilities, of the quarter sessions are to vest in the county council and none in the standing joint committee. That is right, because by s. 30 they are

(1) 58 L. J. (Q.B.) 513, 516.

the people to pay; the county council are to levy the rates; the rates produce the fund out of which they are to pay.

Then there is s. 81. By sub-s. 4 the joint committees are given, subject to the terms of their delegation, the same power as the councils appointing them, and by sub-s. 8 the section applies to the standing joint committees. I had a doubt whether this sub-section included the standing joint committees appointed under s. 30, or whether it referred only to those appointed under sub-s. 7. There seems no reason for so limiting sub-s. 8, and it would be absurd that the standing joint committee of two or more counties or county boroughs should have different powers from those of a single county. If this be so, sub-s. 4 gives the standing joint committee the same power of contracting as the quarter sessions and the county council had.

Lastly there is s. 25 of the Police Act, 1890, which gives express power to the police authority (in this case the standing joint committee) to make agreements with other police authorities, and it is out of these very agreements that these claims arise. I do not see how it can be said, having regard to the words of the section, that these aiding agreements were to be made, not with the standing joint committee, but with the county council. Then if the aiding agreements provide, as many of them did here, for the housing and feeding by the aided authority, it necessitates the aided authority entering into contracts for such housing and feeding. Are the aiding agreements to be made with the standing joint committee and the other agreements with the county council? Surely that is impossible. It seems to me that if the Legislature had intended that all agreements, of whatever kind, negotiated by the standing joint committee should be in the name of the county council it would have been so provided in terms. Mr. Franklen, the clerk of the peace, in his evidence stated that it was the practice in Glamorganshire to make some agreements (but not agreements of this kind) in the name of the county council, but it does not seem to me that any such practice can be looked at for the purpose of construing the Act, and it is within my own knowledge that in other counties the practice is quite different.

I think the judgment should declare that the standing joint committee are liable to pay all the claims of both plaintiffs in respect

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of all the police other than the metropolitan police (subject to the inquiry as to the items), and that they are not liable to pay the claims in respect of the metropolitan police. As regards the county council, they were in my opinion proper parties to this action for two reasons: one because they as the paymasters are the persons really interested, and the other because I think that the plaintiffs are entitled to an order that the county council should pay to the plaintiffs the sums for which the standing joint committee are found to be liable. I do not feel pressed by the concluding words of s. 30 of the Act of 1888. If the standing joint committee enter into a contract they by that very act determine that their liabilities under that contract are an expenditure required for the purpose of the matters mentioned in the section. If there is any dispute between them and the other parties to the contract about the amount of the liability, that dispute has to be decided by the ordinary tribunal, namely, a Court of law. If the standing joint committee incur debts or liabilities in relation to matters referred to them the county council must pay them. I am sorry that the standing joint committee and the county council should have severed in their defences and incurred the great cost of appearing separately. The interest of the two bodies was precisely the same, and the course they have taken is quite wrong, but I suppose the unfortunate ratepayers will have to pay these double costs. There is another point on which I should like to express an opinion. The real reason for the refusal of the county council to pay these claims seems to have been that they thought that the colliery proprietors ought to pay for having the lives of their employees and their property protected. The colliery proprietors have to pay rates like other persons, and have a right to have the same protection as other persons living and owning property in the county.

I agree with what has been said by Phillimore L.J. as to costs.

*Order varied.*

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.*

Solicitors for standing joint committee and county council: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

W. F. B.

[IN THE COURT OF APPEAL.]

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## MERCANTILE MARINE SERVICE ASSOCIATION *v.* TOMS AND OTHERS.

[1915 M. 1683.]

*Practice—Parties—"Persons having the same interes one cause or matter"—Unincorporated Society—Libel published in Society's Journal—Leave to sue one or more Members on behalf of all—Order* XVI., *r.* 9.

The plaintiffs brought an action for an alleged libel published in a journal owned and managed by the Imperial Merchant Service Guild. The guild was an unincorporated body having for its objects the protection of the interests and the legal defence of captains, officers, and apprentices of the merchant service. It consisted of about 15,000 members, and its business and affairs were conducted under the control and supervision of a management committee, of which the chairman, vice-chairman, and secretary were members. The plaintiffs issued the writ in the action against the chairman, vice-chairman, and secretary of the guild "sued on their own behalf and on behalf of all other members of" the guild, and applied for an order under Order XVI., r. 9, that the defendants should be appointed to represent all other members of the guild:—

*Held*, that the order ought not to be made.

APPEAL from an order of Low J. in chambers.

The action was for libel. The defendants on the writ were described as "Alfred Bertram Toms, T. W. Moore, and John W. Grace (sued on their own behalf and on behalf of all other members of the Imperial Merchant Service Guild), and Charles Birchall, Limited." The claim indorsed on the writ was for damages for libel contained in the *Guild Gazette*, a journal of the Imperial Merchant Service Guild, published September 1, 1915. The guild was an unincorporated body.

The plaintiffs applied, under Order XVI., r. 9, for an order that the defendants Toms, Moore, and Grace should be appointed to represent all other members of the Imperial Merchant Service Guild, and for leave to add as defendants in the action Andrew Kinloch and Andrew Wilkinson, who with the defendant Moore were the trustees of the invested funds of the guild.

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It was stated in an affidavit made by the secretary of the plaintiff association in support of the application that the *Guild Gazette* was a journal of the Imperial Merchant Service Guild and was owned and managed by the guild; that the guild, which had for its objects (inter alia) the protection of the interests and the legal defence of captains, officers, and apprentices of the merchant service, was composed of a very large number of persons (stated during the argument to be about 15,000) who had a community of interest in the funds of the guild and in the *Guild Gazette;* that the rules of the guild provided that in the event of a dissolution of the guild or its amalgamation with another body the funds should be divided equally among its existing members; and that the defendants Toms, Moore, and Grace were respectively chairman, secretary, and vice-chairman of the guild, and that the chairman and vice-chairman were members of the management committee.

The business and affairs of the guild were under the control and supervision of a management committee, which had power under the rules from time to time to invest such part of the funds of the guild as they thought fit in the names of trustees. The *Guild Gazette* was stated to be published three times a year.

The district registrar dismissed the application, and his decision was affirmed by Low J. The plaintiffs by leave appealed.

*Rigby Swift, K.C.*, and *J. H. Layton*, for the plaintiffs. It is common practice in the Chancery Division, where there are numerous defendants, to make a representation order under Order XVI., r. 9: *Andrews* v. *Salmon* (1); *Parr* v. *Lancashire and Cheshire Miners' Federation.* (2) In *Walker* v. *Sur* (3) a representation order was refused upon the ground that the persons sought to be declared representatives did not represent the unincorporated society, and there were no funds vested in trustees who could be joined as representing the society. In *Duke of Bedford* v. *Ellis* (4) Lord Macnaghten expressed disapproval of the dictum of Lindley L.J. in *Temperton* v. *Russell* (5) that Order XVI., r. 9, "only extends

(1) [1888] W. N. 102.
(2) [1913] 1 Ch. 366.
(3) [1914] 2 K. B. 930.
(4) [1901] A. C. 1, 8.
(5) [1893] 1 Q. B. 435, 438.

to persons who have or claim some beneficial proprietary right which they are asserting or defending." The further statement of Lindley L.J. in that case that the rule ought not to be construed as extending to actions of tort is not consistent with the later authorities; and Wills J.'s explanation in *Wood* v. *McCarthy* (1) of the above-mentioned passage in the judgment of Lindley L.J. in *Temperton* v. *Russell* (2) also falls under Lord Macnaghten's disapproval. In *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (3) Lord Macnaghten, after stating that *Temperton* v. *Russell* (4) was a case where the persons selected as representatives represented no one but themselves, disapproved of a suggestion by counsel for the respondents that "if a wrong was committed by a body of persons, acting in concert, who were too numerous to be made defendants in an action, the person injured would be without remedy, unless he could fasten upon the individuals who with their own hands were actually doing the wrong." Lord Lindley (at p. 443) took the same view. Those expressions of opinion apply to the present case. The proper persons to represent the society have been sued here. There is nothing in Order XVI., r. 9, to limit it to actions of contract, and the above-mentioned dicta show that the rule extends to an action of tort. All the members of the guild have a common interest in whatever is published in the gazette, and in order to recover any damages which may be awarded it is necessary to sue the defendants as representing the guild and to join the trustees in whom the funds of the guild are vested. A representation order ought therefore to be made. [*Linaker* v. *Pilcher* (5) was also referred to.]

*Gordon Hewart, K.C.*, and *Greaves Lord*, for the defendants, were not called upon.

SWINFEN EADY L.J. The plaintiffs by their writ claim damages for libel. The defendants on the record are Toms, Grace, and Moore, the writ stating that they are "sued on their own behalf and on behalf of all other members of the Imperial Merchant Service Guild," and Charles Birchall, Limited. The Imperial Merchant

(1) [1893] 1 Q. B. 775, 778.
(2) [1893] 1 Q. B. 435, 438.
(3) [1901] A. C. 426, 439.
(4) [1893] 1 Q. B. 435.
(5) (1901) 84 L. T. 421.

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Service Guild is an unregistered association. It has, we are told, some 15,000 members. It is regulated by rules, and its affairs are governed by a managing committee. We are also told that the *Guild Gazette*, which is the journal of the guild, and in which the plaintiffs complain that they have been libelled, is published three times a year.

The plaintiffs ask in the first place for an order that the defendants Toms, Moore, and Grace, who are respectively the chairman, secretary, and vice-chairman, be appointed to represent all other members of the guild in this action of libel. They apply in the next place for leave to add as defendants in the action Andrew Kinloch and Andrew Wilkinson, who with the defendant Moore are the trustees of the invested funds of the guild. If this were merely an application for leave to add defendants there would, I conceive, be no objection to it. The plaintiffs, however, not only desire to have the three trustees as defendants on the record, but they also ask that the three officers who are defendants on the record may be appointed to represent all the members of the guild. They make the application under Order XVI., r. 9, which provides: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

I have great difficulty in seeing that in this case there are numerous persons having the same interest in this cause or matter within the meaning of the rule. The action is for libel, and the plaintiffs must prove who published the libel, and prima facie only those who have published it either by themselves or by their servants or agents or have authorized its publication are liable. The various members of this association may be in a wholly different position. If the members of the management committee were sued, and if in fact they had authorized the publication of the libel, they could raise such defences as might be open to them. It might be that their defence would be that the words complained of were not capable of the meaning alleged or of any defamatory meaning, or that the words did not refer to the plaintiffs. The other members of the association, if sued, might say that, however

defamatory the words complained of might be, they did not authorize their publication; that they were on the high seas and knew nothing about the matter. In my opinion this rule is not intended to apply to such a case as this. I think that the observation of Lindley L.J. in *Temperton* v. *Russell* (1) (towards the end of p. 438) is applicable to this case where he says—I am paraphrasing it to make it applicable to the present case—that the persons assumed to be represented by these three officers, the chairman, vice-chairman, and secretary, have no such interest as is contemplated by the rule. I asked during the course of the argument whether there is any authority in the case of an action of tort, because this is pure tort, for the application of this rule, and no case has been referred to, and so far as I know there is no case in the books in which it has been done. In *Wood* v. *McCarthy* (2) Wills J., referring to the observation of Lindley L.J. on Order XVI., r. 9, in *Temperton* v. *Russell* (1) (near the top of p. 438), said that the Lord Justice was referring to the well-established practice in the Court of Chancery, and was pointing out the distinction in that respect between actions of contract and actions of tort. Lindley L.J. in the passage referred to by Wills J. said this: "This expression only extends, we think, to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action . . . . is founded on tort." It is true that the limitation of the rule stated by Lindley L.J., namely, that the expression "having the same interest in one cause or matter" only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter, has been dissented from, and is no longer law. But apart from that the decision in *Temperton* v. *Russell* (1) is good law. In *Wood* v. *McCarthy* (2) Wills J. was of opinion that Order XVI., r. 9, did not apply to actions of tort, and I am not aware that the rule has ever been applied in cases of the kind, and one can see many reasons why it should not be so applied. The judgments of Buckley L.J. and of Kennedy L.J. in *Walker* v. *Sur* (3) illustrate this. There are, no doubt,

(1) [1893] 1 Q. B. 435. (2) [1893] 1 Q. B. 775.
(3) [1914] 2 K. B. 930.

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dicta in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1), especially in the speech of Lord Macnaghten, which indicate that in a proper case it is possible that an order of that kind may be made; but I am quite satisfied that the present case is not one of those cases, and no order ought to be made here. If it be the fact that the issue of this paper contains a libel, the plaintiffs can sue and obtain relief against the persons who have authorized the libel and who have directed its publication.

That being so, I am of opinion that the order is right, and that the appeal should be dismissed.

PICKFORD L.J. I am of the same opinion. We start with the fact that no such order has ever been known to be made. It does not, however, follow that the order cannot be made, but at any rate it suggests doubts as to whether it ought to be made. It is sought in an action of libel to make defendants by representation some 15,000 members of an unincorporated association. It does not seem to me that it is at all necessary to do so in order to give the plaintiffs such rights as they may be found to be entitled to. No reason has been given to us why the plaintiffs will be able to try their right more fairly or to get their remedy more certainly if this order is made. There are many dicta in wide terms, some of which, no doubt, seem prima facie to cover a case of this kind. There are other dicta equally strong, such as that of Lindley L.J. in *Temperton* v. *Russell* (2), referred to by Wills J. in *Wood* v. *McCarthy* (3), which are against such an order being made. In *Duke of Bedford* v. *Ellis* (4) Lord Macnaghten said: "As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right." I asked counsel whether he was able to say that with the action as at present constituted, or perhaps with the addition of the trustees, the right could not be fairly tried, and he admitted that he was not able to say so. If that be so, and the plaintiffs can fairly try the right with the action as at present constituted, or perhaps with the addition of the trustees,

(1) [1901] A. C. 426.
(2) [1893] 1 Q. B. 435.
(3) [1893] 1 Q. B. 775.
(4) [1901] A. C. 10, 11.

it seems to me that there is no reason whatever to make the order in this case, and therefore the appeal will be dismissed.

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*Appeal dismissed.*

Solicitors for plaintiffs: *Field, Roscoe & Co., for Whitley & Co., Liverpool.*

Solicitors for defendants: *Ellis Davies, Roberts & Co., for Miller, Taylor & Holmes, Liverpool.*

W. F. B.

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## THE KING *v.* THE GENERAL COMMISSIONERS OF INCOME TAX FOR SOUTHAMPTON.

*Ex parte* W. M. SINGER.

1916
*Jan.* 13, 14; *April* 4.

*Revenue—Income Tax—Foreign Securities—Place of Assessment—Jurisdiction of Commissioners at Place of Residence—Retrospective Effect of Legislation—Income Tax Act,* 1842 (5 *&* 6 *Vict. c.* 35), *s.* 108—*Finance* (*No.* 2) *Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 32.

By s. 32 of the Finance (No. 2) Act, 1915, which came into force on December 23, 1915, it is enacted that, "(1.) Notwithstanding anything in section one hundred and six or one hundred and forty-six of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D or E, . . . . by commissioners acting for any parish or place in which that person ordinarily resides; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right commissioners. (2.) Section one hundred and eight of the Income Tax Act, 1842 (which makes provision as to the place at which persons are to be assessed to income tax in respect of profits or gains arising from foreign and colonial possessions or securities) is hereby repealed."

On March 30, 1915, an additional assessment to income tax was made upon S. by the additional Commissioners for the district in which he resided in respect of dividends received by him in England from an American company. Notice of the assessment was given to S. on October 19, 1915, and on October 26 he obtained a rule nisi to prohibit the General Commissioners for the district from proceeding upon the assessment on the ground that by s. 108 of the Income Tax Act, 1842, the assessment could only be made by the Commissioners for Bristol, that being the nearest of the four places

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mentioned in s. 108 to the place where S. resided. Cause was shown against the rule on January 13, 1916 :—

*Held*, that sub-s. 1 of s. 32 of the Finance (No. 2) Act, 1915, applied to the case of an assessment made under s. 108, that the retrospective effect of the section extended to proceedings for a prohibition commenced before the Act came into force, and that the assessment must, therefore, be deemed to have been made by the right Commissioners, and that the rule nisi for a prohibition must be discharged.

RULE NISI to the General Commissioners for the purposes of the Income Tax Acts for the district of Southampton to show cause why a writ of prohibition should not issue to prohibit them from allowing, confirming, making, enforcing, or otherwise proceeding on an assessment on Washington Singer, of Norman Court, Tytherley, Hampshire, for the year ending April 5, 1912, whereby it was sought to make him chargeable in respect of profits from foreign possessions on an amount of 160,000*l.* on the ground (inter alia) that all assessments in respect of income from foreign possessions must, by s. 108 of the Income Tax Act, 1842, be made by the Commissioners for the purposes of the Income Tax Acts acting for the respective places London, Bristol, Liverpool, and Glasgow according to the regulations of the said Acts, and no such assessments can be made by Commissioners acting for any other place.

The rule nisi should have been directed to the General Commissioners and the surveyor of taxes for the district of Romsey, and not Southampton, and it was agreed that the case should be dealt with as if the right parties had been made respondents.

The rule nisi was obtained on October 26, 1915, and cause was shown against it on January 13, 1916. The Finance (No. 2) Act, 1915 (1), came into force on December 23, 1915.

(1) Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 32 :

"(1.) Notwithstanding anything in section one hundred and six or one hundred and forty-six of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D. or E., whether or not he is engaged in any trade, manufacture, adventure, or concern, or any employment, vocation, or office, by commissioners acting for any parish or place in which that person ordinarily resides ; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right commissioners :

*Sir George Cave, S.-G.*, and *T. H. Parr* (for *Raymond Asquith*, now serving with His Majesty's Forces) showed cause on behalf of the surveyor of taxes. In *Kensington Income Tax Commissioners* v. *Aramayo* (1) the House of Lords decided that under s. 108 of the Income Tax Act, 1842, the duty in respect of profits arising from foreign possessions can only be assessed and charged by the Commissioners acting for London, Bristol, Liverpool, or Glasgow, and in each particular case by the Commissioners acting for such of those places at or nearest to which the property has been first imported into Great Britain. But for recent legislation that case would govern the present and would show that the assessment on the applicant was wrong as not having been made by the proper Commissioners. Sect. 32 of the Finance (No. 2) Act, 1915, has, however, been passed since this rule was obtained, and its effect is to alter the law laid down in the *Aramayo Case* (1) and to validate the assessment made on the applicant. Sub-s. 1 of s. 32 is perfectly general in its terms, and, although it only refers specifically to s. 106 of the Income Tax Act, 1842, and not to s. 108, the reason is because s. 108 is repealed by sub-s. 2. It is, however, suggested on behalf of the applicant that an "assessment" is not a "charge" so as to come within s. 32 at all. That contention is unfounded. Dealing in the *Aramayo Case* (1) with the words "assessment" and "charge," Lord Wrenbury said that "it is not possible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense." The word "charge" in s. 32, sub-s. 1, must be taken in its wider sense as including not only a charge in the strictest sense, but also the quasi-charge made by the first assessment: see *Rex* v. *Bloomsbury Income Tax Commissioners*. (2) The object of s. 32, sub-s. 1, is to get rid of the technical objection that the assessment had been made by the wrong Commissioners.

"Provided that nothing in this section shall affect the operation of section one hundred and seventy-one of the Income Tax Act, 1842, with respect to double assessments.

"(2.) Section one hundred and eight of the Income Tax Act, 1842 (which makes provision as to the place at which persons are to be assessed to income tax in respect of profits or gains arising from foreign and colonial possessions or securities) is hereby repealed."

(1) [1916] 1 A. C. 215, 227.

(2) [1915] 3 K. B. 768, 781.

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A further ground was taken when this rule was obtained, namely, that the assessment on the applicant, which was in respect of the year 1911-12 expiring on April 5, 1912, was not made until after April 5, 1915, and was therefore invalid by virtue of s. 52 of the Taxes Management Act, 1880, as amended by s. 23 of the Finance Act, 1907, as having been made more than three years after the expiration of the year for which the assessment was made. In the *Aramayo Case* in the Divisional Court, reported as *Rex* v. *Kensington Income Tax Commissioners* (1), it was decided that if the additional first assessment was signed within the three years the statutory requirements were satisfied although the assessment was not confirmed by the General Commissioners until after the expiration of that period; and the decision upon this point still stands notwithstanding the reversal of the decision upon other points by the House of Lords. In this case the additional first assessment was made on March 30, 1915, within the three years.

*Bremner*, for the General Commissioners for Romsey.

*Sir Robert Finlay, K.C.*, and *G. M. Edwardes Jones*, in support of the rule. First, s. 32, sub-s. 1, of the Finance (No. 2) Act, 1915, has no application to the matter in dispute. It cannot fairly be construed as meaning more than this, that the provisions of s. 106 of the Income Tax Act, 1842, and any similar enactment shall not prevent a person being assessed by the Commissioners of the place where he resides. The Legislature was there correcting the effect of the construction put upon s. 106 in the *Aramayo Case*. (2) Sect. 108 of the Income Tax Act, 1842, is dealt with separately and no retrospective effect is given to it. If sub-s. 2 of s. 32 were absent s. 108 would remain unimpaired. Sect. 108 is simply repealed as to the future.

Secondly, that part of sub-s. 1 of s. 32 which professes to have a retrospective effect does not cover the facts of this case. The word "charge" in the earlier part of the sub-section means the completed charge. If it had been intended to include the first step towards a charge, namely, the assessment, the sub-section would have expressly said so. An assessment only becomes a charge when it is confirmed. Various sections of the Taxes Management Act, 1880, show this. Thus, s. 55, which provides that "no assessment, nor any charge made upon any assessment, shall be impeached or affected" by

(1) [1913] 3 K. B. 870. (2) [1916] 1 A. C. 215.

certain circumstances, shows clearly the marked distinction between an "assessment" and a "charge." The word "charged" in the earlier part of sub-s. 1 of s. 32 being used in its strict sense must be construed in the same way in the latter part. In the absence of any words in the Act indicating that the Act was intended to affect rights, as distinguished from procedure, pending proceedings are unaffected by it: *Hitchcock* v. *Way* (1); *Moon* v. *Durden*, per Parke B. (2); *Wright* v. *Hale* (3); *Lauri* v. *Renad* (4); *The Ydun* (5); *In re Joseph Suche & Co.* (6); *Colonial Sugar Refining Co.* v. *Irving*. (7)

Thirdly, in any view s. 32, sub-s. 1, does not apply because of the general rule that an Act of Parliament does not apply to pending proceedings unless it is clear from the language used that it was intended to do so: see Craies' Statute Law, pp. 327 et seq. In this case the rule was obtained before the Finance (No. 2) Act, 1915, was passed; and there are no clear words in sub-s. 1 to show that it was intended to apply to pending proceedings.

Finally, although the point that this assessment was out of time is not open to the applicant in this Court, we formally take it in order to preserve his rights in the event of the case going further. (8)

*Sir George Cave, S.-G.*, in reply. No reason has been, or can be, suggested why Parliament should have dealt retrospectively with s. 106 but not with s. 108. The reason why there is a separate clause, sub-s. 2 of s. 32, dealing with s. 108 is that, whereas in cases within s. 106 an alternative place of assessment is being given, in cases within s. 108 it is not an alternative, but a substituted, place that is provided for. But sub-s. 1 does really deal with s. 108 as well as with s. 106, for the words "so charged" in sub-s. 1 refer back to the word "charged" in the earlier part of the sub-section and thus bring in not only s. 106, but "any other enactment relating to

(1) (1837) 6 Ad. & E. 943.
(2) (1848) 2 Ex. 22, 42.
(3) (1860) 6 H. & N. 227.
(4) [1892] 3 Ch. 402.
(5) [1899] P. 236.
(6) (1875) 1 Ch. D. 48.
(7) [1905] A. C. 369.
(8) It was also contended that the proceedings leading to the assessment had not been instituted by the surveyor of the district of the Commissioners making the assessment, and leave was obtained to amend the rule so as to raise this point, which turned on s. 52 of the Taxes Management Act, 1880. In the result the Court held on the facts that the surveyor in question was properly acting for the district in question. The arguments on this point are therefore omitted.

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income tax," which includes s. 108. The obtaining of the rule nisi before the Act came into force does not cause these proceedings to be pending proceedings within the suggested principle that in the absence of clear words an Act of Parliament does not apply retrospectively to pending proceedings. A rule nisi for a prohibition is not like the issue of a writ and does not give rise to any vested rights; cause may be shown against the rule on any ground existing at the time of showing cause. There is, however, no rule that the retrospective effect of a statute does not apply to pending legal proceedings: *Attorney-General* v. *Theobald* (1); *Pardo* v. *Bingham.* (2)

*Cur. adv. vult.*

April 4. The judgment of the COURT (Lord Reading C.J., Sankey and Low JJ.) was read by

LORD READING C.J. The applicant, Washington Singer, seeks to prohibit the General Commissioners for Income Tax for the district of Southampton from proceeding upon an assessment made upon him by the additional Commissioners for the district of Romsey in respect of profits arising from foreign securities. The income assessed was derived from dividends received in this country by the applicant from the Singer Manufacturing Company, a corporation formed and carrying on business in the United States of America. The additional Commissioners came to the conclusion that the applicant had been undercharged in respect of the income so received by him in this country. Consequently an additional assessment was made upon him on March 30, 1915, in respect of the profits of the income tax year 1911-1912. Correspondence was meanwhile passing between the parties, and notice of the assessment was not given to the applicant until October 19, 1915. Application was thereupon made to this Court on October 26 last for an order nisi for prohibition. The grounds of the application were—(1.) that there was no jurisdiction in the respondents to make an assessment upon the applicant in respect of profits received by him in this country from foreign securities inasmuch as by virtue of s. 108 of the Income Tax Act, 1842, the only Commissioners having jurisdiction to assess him in respect of such profits were the Commissioners for Bristol, that being

(1) (1890) 24 Q. B. D. 557. (2) (1869) L. R. 4 Ch. 735.

the nearest of the four places mentioned in this section to the place where the applicant resided, namely, Norman Court, Romsey, in Hampshire ; and (2.) that the assessment was for the year 1911-1912 expiring on April 5, 1912, and was not made until after April 5, 1915, that is, after the expiry of three years from the year for which the assessment was made, and therefore it was not a valid assessment under the Income Tax Acts for the year 1911-1912. This point was decided by the Divisional Court in *Rex* v. *Kensington Income Tax Commissioners* (1), and was merely stated, but not argued, in this Court to enable the applicant to raise it on appeal if necessary. A third ground was that the applicant had not been undercharged and had paid all income tax chargeable against him for the year in question. The evidence was not fully before us and there is an issue of fact between the parties upon this point. It was not argued, as it is not a ground for prohibition.

The order nisi should have been against the General Commissioners for the district of Romsey, but by desire of the Crown the case was treated as if the order had been addressed to the right Commissioners.

The Solicitor-General, in showing cause against the order, did not dispute that the respondents, according to the decision of the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo* (2), when making the assessment, had no jurisdiction to make it, and that at that time the Commissioners for Bristol, by virtue of s. 108, had exclusive jurisdiction to assess the applicant in respect of profits derived from foreign securities. But he contended that this objection, which otherwise would have been fatal to the claim by the Commissioners, was cured by s. 32 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), passed on December 23, 1915. The material part of s. 32 is as follows : " Notwithstanding anything in section one hundred and six or one hundred and forty-six of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D. or E., whether or not he is engaged in any trade, manufacture, adventure, or concern, or any employment, vocation, or office, by commissioners acting for any parish or place in which that person ordinarily resides ; and if any person has been so charged before the commencement of this

(1) [1913] 3 K. B. 870. (2) [1916] 1 A. C. 215.

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Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right commissioners." By s. 51 of this Act, Part II. (including s. 32) is to be construed and read together with the Income Tax Acts. The argument is that this section has a retrospective effect, and that as the assessment was in fact made by the Commissioners for the parish or place in which the applicant ordinarily resided it is to be regarded as a valid assessment. Sir Robert Finlay, for the respondents, contended that this section does not relate to the matters in dispute on the grounds that (1.) its retrospective effect is limited to assessments under s. 106 and does not extend to assessments under s. 108, and that s. 108 is only repealed as to the future and continues of full force and effect with regard to acts done under it before the statute became law; (2.) the retrospective effect does not apply to pending proceedings; and (3.) the section refers to a charge and has no application to an assessment made only by the additional Commissioners and which is not a charge until allowed and confirmed by the General Commissioners.

The language of the section shows clearly that Parliament intended it to have a retrospective effect. The object was to prevent loss to the revenue when Commissioners had acted who were not, under the statutes, the right Commissioners to make the charge, provided that it was made by the Commissioners for the parish or place in which the person charged ordinarily resided. That the section was retrospective in effect was not disputed by Sir Robert Finlay, but he argued that the retrospective operation is limited by the language of the section and does not extend to a charge made in respect of profits derived from foreign possessions or securities under s. 108 of the Income Tax Act, 1842. In support of this argument he relied upon the express reference in the first sub-section of s. 32 to s. 106, and s. 146 of the Income Tax Act, 1842, upon the omission of any reference in this sub-section to s. 108, and upon the repeal in sub-s. 2 of s. 32 of s. 108. He contended that if the Legislature had meant to include s. 108 in the first sub-section it would have referred to it in express terms and would not merely have repealed it by the second sub-section. In the first sub-section mention is made of other sections of the Income Tax Acts, but not of s. 108. It must be taken, he argued, that Parliament had in mind the difficulties created by

s. 108, which were pointed out in *Aramayo's Case* (1) by the House of Lords, and that Parliament intended to remove these difficulties by the repeal of s. 108 so as to prevent its operation in future, but did not mean to change the law as regards acts done before the passing of the statute.

The question must depend upon the construction of the language of s. 32. The rules to be applied are well settled. It is a fundamental rule of English law that enactments in a statute are generally to be construed as prospective and intended to regulate future conduct, but this rule is one of construction only and must yield to the intention of the Legislature: *Moon* v. *Durden* (2), per Parke B. It is also the law that a statute is not to be construed to have greater retrospective operation than its language renders necessary: *Lauri* v. *Renad* (3), per Lindley L.J. To ascertain the intention regard should be had to the general scope and purview of the enactment, to the remedy sought to be applied, to the former state of the law, and to what was in the contemplation of the Legislature: *Pardo* v. *Bingham* (4), per Lord Hatherley L.C.

Applying these rules to the construction of the section, I come to the conclusion that Parliament did intend sub-s. 1 to apply to a charge under s. 108 as well as under s. 106. By the first sub-section jurisdiction was conferred upon the Commissioners where a person ordinarily resided to charge him to income tax under Scheds. D and E. Sect. 32 of the Act of 1915 was enacted shortly after the decision of the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo*. (1) In that case it was stated that the prevailing practice had hitherto been to tax persons under Sched. D and under s. 108 where they resided. Their Lordships held that this practice was wrong and that the tax on profits under s. 108 must be charged exclusively by the Commissioners at the place provided under s. 108, and that the tax on other profits under Sched. D must be charged as provided under s. 106. Parliament intended to remedy the technical difficulty thus created in the collection of revenue and to take away a technical defence from a person properly chargeable to income tax provided that he had been assessed by the Commissioners for the parish or place where he resided. Sect. 32 means that,

(1) [1916] 1 A. C. 215.
(2) 2 Ex. 22, 42.
(3) [1892] 3 Ch. 421.
(4) L. R. 4 Ch. 740.

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notwithstanding any other provision in any income tax statute, a person may be charged under s. 108 by Commissioners for the place or parish where he resides. If he had been charged by these Commissioners before s. 32 became law, then, notwithstanding that they had hitherto no jurisdiction to make the charge, it shall not be deemed invalid merely because it has been made by wrong Commissioners. I think the matter is sufficiently plain, once it is borne in mind that s. 108 relates to a charge under Sched. D and is only a proviso to s. 106. Sect. 106 dealt with the different classes of persons assessable to income tax under Sched. D and with the different Commissioners to assess them. Sect. 108 did not create a new class of persons assessable to income tax, but it provided that, with regard to a certain class of property, that is, profits received in this country from foreign possessions, a different body of Commissioners should act, upon whom exclusive jurisdiction in respect of such profits was conferred. That was the law enacted in 1842 as interpreted by the House of Lords in 1915 in *Aramayo's Case.* (1) Parliament then altered the law. As regards acts done after the passing of the Act, Parliament conferred jurisdiction upon the Commissioners for the place where the subject resided to charge him under Sched. D or E, and to charge him under Sched. D in respect of profits from foreign possessions. It did not interfere with the jurisdiction already existing of other Commissioners save as regards the Commissioners under s. 108, whose jurisdiction it abolished. Further, it provided that if the charge to income tax under Scheds. D and E had been made before the passing of this Act by the Commissioners where the subject ordinarily resided the charge should not for that reason be deemed invalid. It follows that if a person has been charged before December 23, 1915, to income tax in respect of profits from foreign possessions by the Commissioners where he ordinarily resides the charge is not to be deemed invalid for that reason, and consequently the objection of the applicant fails.

But then it is argued that as these proceedings were pending at the time of the passing of the Finance (No. 2) Act, 1915, the section cannot apply to them, notwithstanding that it has retrospective effect. The order nisi was made on October 26, 1915, returnable on November 4, 1915. The statute received the Royal assent on

(1) [1916] 1 A. C. 215.

December 23, 1915. This case was not in fact heard till after the passing of the statute. In my opinion the language of the section shows that the intention of the Legislature was that the enactment should apply to pending proceedings. I assume for the purpose of this case, without deciding it, that these proceedings in prohibition are to be regarded as pending proceedings. There is no insuperable objection to construing the language of a statute so as to make it apply to pending proceedings. It depends upon the proper interpretation of the language used by the Legislature. If the legislation did not affect rights of action, but only affected the practice and procedure of the Courts, it would apply to all actions whether commenced before or after the passing of the Act: *The Ydun.* (1) If the legislation did affect rights of action, then it would only apply to actions commenced before the passing of the Act if an intention to that effect is to be gathered from the language of the Act: *Wright* v. *Hale* (2), per Wilde B. The question here is not one affecting practice and procedure; it affects rights of action.

I cannot accept the contention of the applicant that an enactment can only take away vested rights of action for which legal proceedings have been commenced if there are in the enactment express words to that effect. There is no authority for this proposition, and I do not see why in principle it should be the law. But it is necessary that clear language should be used to make the retrospective effect applicable to proceedings commenced before the passing of the statute. I think the language in the section shows this intention sufficiently clearly. I cannot see why the charge, if not made by the right Commissioners, is to be valid if proceedings have not been commenced and invalid if they have been commenced. If Parliament intended, as I think it did, to take away a technical defence, there is no reason why its intention should not apply to pending proceedings. I think Parliament had in mind that proceedings to enforce charges under s. 108 made by the wrong Commissioners might be pending and intended that the Revenue authorities should not be defeated by such an objection.

Upon the third point the argument is that the word " charge " or " charged " means the completed operation of fixing the liability upon a person as distinguished from the proceedings in order to fix

(1) [1899] P. 245, 246. (2) 6 H. & N. 232.

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the liability, such as assessment by the additional Commissioners, and that the Legislature would have said "assessment or charge" had it meant to include an assessment. I do not think that the section is to be construed so narrowly, more particularly as it was passed after the decision of the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo.* (1) In that case there is an exhaustive examination of the sections in the Income Tax Acts and the Taxes Management Act, 1880, containing references to "charge" and "assessment," and in the result their Lordships came to the conclusion that "the word 'charge' is sometimes used to express the preliminary act done by the subordinate officer, the assessor, and also . . . . to express the final act done by the General Commissioners in fixing liability on the taxpayer": per Lord Wrenbury. (2) Their Lordships came to the conclusion that it could not be assumed that the language of these taxing statutes was accurately used to denote the difference between a charge and an assessment, but arrived at the view that "charge" is often used to denote the preliminary proceedings of assessment. It is difficult to understand why Parliament should have conferred jurisdiction upon the Commissioners where the person ordinarily resides to make a charge and have omitted to confer jurisdiction to make an assessment. Having regard to the language used in the various sections of the Acts to which our attention was called, and which are all reviewed in Lord Wrenbury's speech above mentioned, I think the intention was that the section should apply to the proceedings incidental to the making of a charge. These proceedings would include the preliminary stage of making an assessment. In my opinion the section is not limited in its application to the completed operation of a charge, but extends to an assessment.

I am therefore of opinion that s. 32 applies to this case and that the assessment must be deemed to have been made by the right Commissioners.

Finally, the applicant objected that the assessment was invalid because the proceedings leading to the assessment had not been begun by the surveyor of the district of the Commissioners making it and that under s. 52 of the Taxes Management Act, 1880, it is that surveyor only who can start proceedings for an additional assessment.

(1) [1916] 1 A. C. 215. (2) [1916] 1 A. C. 227.

The Court allowed the addition of this ground by amendment. This objection is completely answered on the merits by Mr. Langston's further affidavit. He proves that he was appointed superintending inspector with authority to act as surveyor in any district as occasion might from time to time require; that surveyors retained at the head office and inspectors and superintending inspectors are not subject to any restrictions as to the area in which they are to perform their duties and that they carry out their duties wherever it is expedient; that in the absence of the surveyor of the district of Romsey he undertook the duties of surveyor of that district and therefore was at the material time acting as the surveyor of the district within the meaning of s. 52. In view of these undisputed facts it becomes unnecessary to consider whether in law the proceedings must be commenced by the surveyor appointed for the district. The section clearly does not mean that if the surveyor who usually acts in the district is away, either from illness or on a holiday or from any other cause, no other surveyor could act in that district, and indeed this was not contended before us. That Mr. Langston could act as surveyor for the district is plain, and once it is established that he was authorized to act and did act in that capacity in the absence of the surveyor who usually acted for the district, the objection of the applicant fails.

This is the judgment of the Court with which my brothers agree.

*Rule discharged.*

Solicitor for surveyor: *Solicitor of Inland Revenue.*

Solicitors for Romsey Commissioners: *Mawby, Mawby & Morris, for W. H. Bell, Romsey.*

Solicitors for applicant: *Church, Rendell, Bird & Co.*

F. O. R.

K. B. D. 1915 *Nov.* 29, 30; *Dec.* 1, 2. 1916 *Feb.* 21. C. A. *April* 5, 6, 7, 14.

[RAILWAY AND CANAL COMMISSION AND IN THE COURT OF APPEAL.]

## ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED *v.* GREAT NORTHERN RAILWAY COMPANY.

*Railway—Rates—Increase—Justification—Rise in Cost of Working—Improvements in Conditions of Employment—Proof—Railway and Canal Traffic Act*, 1913 (2 & 3 *Geo.* 5, *c.* 29), *s.* 1.

The Railway and Canal Traffic Act, 1913, does not impose upon railway companies seeking to justify an increase of rates the same burden of proving that the increase was reasonable as was imposed by the Railway and Canal Traffic Act, 1894.

In order to determine under s. 1 of the Act of 1913 whether a particular increase for the purpose of meeting "a rise in the cost of working the railway," resulting from improvements made by the company since August 19, 1911, in the conditions of employment of labour, is justified, the right method is to compare the actual cost of labour in connection with the goods traffic at the date of the increase complained of with what would have been the cost of that labour under the old conditions.

APPEAL from a decision of the Railway Commissioners.

The applicants, who carried on business as cement manufacturers, claimed a declaration that certain increased rates for the carriage of cement by the defendant railway company were unreasonable. The defendants by their answer alleged that the increases of the rates complained of were part of an increase in the rates made on July 1, 1913, and were reasonably required for the purpose of meeting a rise in the cost of working the defendants' railway (excluding the cost of carrying and dealing with passengers) resulting from improvements made by them since August 19, 1911, in the conditions of employment of their labour and clerical staff, and were justified under s. 1 of the Railway and Canal Traffic Act, 1913.

Sect. 1 of that Act provides that: "(1.) Where on a complaint with respect to any increase (within any limit fixed by an Act of Parliament, or by a Provisional Order confirmed by an Act of Parliament) of any rate or charge under section one of the Rail-

way and Canal Traffic Act, 1894, the railway company proves to the satisfaction of the Railway and Canal Commissioners—(*a*) that there has been a rise in the cost of working the railway, excluding the cost of carrying and dealing with passengers, resulting from improvements made by the company since the nineteenth day of August nineteen hundred and eleven in the conditions of employment of their labour or clerical staff; and (*b*) that the whole of the particular increase of rate or charge of which complaint is made is part of an increase of rates or charges made for the purpose of meeting the said rise in the cost of working; and (*c*) that the increase of rates or charges made for the purpose of meeting the said rise in the cost of working is not, in the whole, greater than is reasonably required for the purpose; and (*d*) that the proportion of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable; the Commissioners shall treat the increase of rate or charge as justified: Provided that nothing in this section shall be construed as preventing the Commissioners from taking into account any circumstances which are relevant to the determination whether an increase of rates or charges is or is not greater than is reasonably required for the purpose of meeting the said rise in cost of working."

The evidence for the defendants showed that they had paid higher wages and shortened the hours of work, and had, so it was said, thereby largely increased the cost of working the railway. To meet this they had made an increase in the rates. They first proved what was the total amount actually paid to their whole staff during the last week before the new rates came into force. They then showed what these payments would have amounted to under the old conditions previously to August 19, 1911. The excess represented the extra payments made owing to the improved conditions of labour for that week. The total for the whole year was then arrived at by taking the week in question as an average week. The total increase for goods traffic amounted to about 120,000*l*. The increase in rates, which was confined to "exceptional rate" traffic, yielded an additional revenue of rather more than 69,000*l*. The balance, about 50,000*l*., was borne by the defendants themselves.

The applicants contended that the defendants had adopted a

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wrong method of proof, and that they had not given the necessary and proper evidence of a rise in the cost of working the railway; that the defendants should have given evidence of their goods traffic receipts at the time when the increase was made and previously, and should have dealt with the cost of carrying the traffic per ton per mile; and that an increase amounting to about 29,000*l.* was all that could be justified. They also contended that the allocation of the increase to "exceptional rate" traffic was not reasonable.

1915. Nov. 29, 30; Dec. 1, 2. *Rowland Whitehead*, *K.C.*, and *Holman Gregory*, *K.C.* (*Edwin Clements* with them), for the applicants.

*G. J. Talbot*, *K.C.*, and *Lynden Macassey*, *K.C.* (*W. Bruce Thomas* with them), for the defendants.

*Cur. adv. vult.*

1916. Feb. 21. The following written judgments were delivered:—

LUSH J. The question that we have to decide in this case depends mainly upon the construction to be placed upon the Railway and Canal Traffic Act, 1913. The case is one of considerable importance, and a large number of other cases are pending raising substantially the same question. The facts of this case, as far as they are material for our consideration, are not seriously in controversy.

The Act was passed after a grave crisis had arisen in August, 1911, between the railway companies and the men with regard to rates of wages and hours of labour, &c. The position was a serious one, and, in order to provide a way out of the difficulty it was suggested that, if the companies agreed to make the necessary concessions, special facilities would be provided for raising their rates on the carriage of goods. It was accordingly agreed to make the concessions. The Act was passed on March 7, 1913, and as from July 1, 1913, the increased rates were imposed which are the subject of the present proceedings. The applicants have complained to this Court and contended that the increased rates are not justified by the Act and that no proper or sufficient grounds for making them have been shown by the defendants. Their main contention

is that an erroneous method of proof has been adopted by the defendants.

The title of the Act is this : " An Act to amend section one of the Railway and Canal Traffic Act, 1894, with respect to increases of rates or charges made for the purpose of meeting a rise in the cost of working a railway due to improved labour conditions." The declared object, therefore, is to alter the law as enacted by the statute referred to with respect to the particular increases of rates that are mentioned. That it was passed in the interest of railway companies and for the purpose of giving them facilities which they did not possess under the Act of 1894 was not, and could not be, contested. That Act was passed to restrict railway companies' powers with regard to increasing rates. This Act was passed to enlarge those powers as so restricted.

Now, in order to see what the amendment is that the Act was intended to make, it is necessary, I think, to compare the language used in the two Acts. The first section of the Act of 1894 provided that " Where a railway company have . . . . directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable." Under that Act, therefore, what a railway company has to prove in order to justify an increase of a rate is that, having regard to all the circumstances, the new increased rate is reasonable. The recognized method of dealing with that question is this. The volume of the traffic in question at the time when the old rate was charged and at the time when the increase was made has to be considered, also the receipts obtained by working the traffic during those periods, and the cost of working it. In order to compare the present conditions with those which existed at the earlier date a common unit of comparison has to be found ; and what is done is to ascertain, by computing the train mileage and the other necessary factors, what the cost of carrying the traffic is per ton per mile, and what the proportionate receipts are. This investigation obviously involves the examination of very elaborate and complicated figures.

The Act of 1913, which, as I have said, is an amending Act, and is to be read with the Railway and Canal Traffic Acts, 1873 to 1894,

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is very different in its terms. It provides that the Commissioners shall treat an increase of rate or charge as justified if the railway company proves to the satisfaction of the Court four things: (1.) That there has been a rise in the cost of working the railway, excluding the cost of carrying and dealing with passengers, resulting from improvements made by the company since August 19, 1911, in the conditions of employment of their labour or clerical staff; (2.) that the whole of the particular increase of rate or charge of which complaint is made is part of an increase of rates or charges made for the purpose of meeting the said rise in the cost of working; (3.) that the increase of rates or charges made for the purpose of meeting the said rise in the cost of working is not, in the whole, greater than is reasonably required for the purpose; and (4.) that the proportion of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable. There is a proviso to the section, which is as follows: "Provided that nothing in this section shall be construed as preventing the Commissioners from taking into account any circumstances which are relevant to the determination whether an increase of rates or charges is or is not greater than is reasonably required for the purpose of meeting the said rise in the cost of working." The meaning of this proviso was discussed before us, and its terms were criticized. It was not strictly necessary to insert it, as without it the Court would necessarily have taken any "relevant" circumstances into consideration; but it was obviously added in order to emphasize the fact that the discretion of the Court is not to be fettered in considering whether the increase is reasonably required for the purpose of meeting the rise in cost of working. It will be observed that in this Act, instead of adopting the language of the Act of 1894, where the increase is spoken of as being in itself "reasonable," the Legislature has only required that the increased rate shall be reasonably required to meet a definite and ascertainable rise in cost of working resulting from the improved labour conditions. I agree with Mr. Talbot that that is the real key to the Act. It contemplates that a railway company may have paid higher wages or the same wages for less labour, and thereby increased the cost of working by a certain ascertainable sum, and provides that, if they prove that, they shall have an increased

rate treated as justified if made for the purpose of meeting that increased cost, subject to the fulfilment of the specified conditions.

Now what the defendants have done is this. They have made the contemplated improvements, that is, they have agreed to pay, and have paid, higher wages, and agreed to shorten the hours of work. They have thereby increased the cost in that respect of working the railway, the sum paid being very large. They have not been able to effect any economies by those payments - certainly none of any substance. That was, in my opinion, established by the evidence. To meet this increased cost the defendants made an increase in the rates, and gave the following evidence with regard to it. They first proved what the total amount actually paid to their whole staff was during a particular week, namely, the week ending June 28, 1913, which was the last week before the new rate came into operation, taking the various departments and adding them together. They then showed what these payments would have amounted to under the old conditions just prior to August 19, 1911; the excess represented the extra payments made, owing to the improved conditions of labour, for that week. Treating the week as a fair average week, they got at the total extra payment for a year. They then proved what proportion of this amount represented goods as distinguished from passenger traffic according to "engine-miles." This proportion, the company says, represents the rise in the cost of working the railway (excluding passenger traffic) resulting from the improved conditions of labour. The figure arrived at is 118,588*l.* It should be more. The applicants themselves contended, and clearly correctly, that engine-hours instead of engine-miles should have been taken as the basis in calculating what proportion of that department of expenditure represented goods as distinguished from passenger traffic, and so treating it, the 118,588*l.* is increased to something over 120,000*l.* To provide for this rise in the cost the company have imposed an additional 4 per cent. on all the "exceptional rate" traffic, that is, not imposing any increased rate on coal, coke, and patent fuel, or on class rates. This yields an additional revenue of 69,986*l.* The reason for not imposing any further payment on coal, &c., is that not many years ago the rate was raised and litigation ensued. Matters were adjusted, and

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the parties have been working on the new scale since that time. It was thought undesirable to disturb an arrangement so recently made. The reason for not imposing further payment on class-rate traffic is that the rates are already high on that traffic—in most cases not far from the maximum. Moreover, to allocate between different kinds of goods would involve a very elaborate and extensive investigation. The balance of the increased cost, above 50,000*l.*, speaking roughly, the company bear themselves. They also, of course, bear all the increased cost with regard to passenger traffic.

The applicants, as I have said, contended that the method adopted is erroneous, and that the sum raised is not reasonably required to meet what was said to be the real rise in the cost of working the railway, and that the allocation is not reasonable. I will consider the first two matters together, which will be the more convenient course, and deal separately afterwards with the question of allocation to this particular traffic.

Now the applicants contend that the defendants have adopted a wrong method of proof, and that they have not given the necessary and proper evidence of a rise in the cost of working the railway. Their case is that the defendants were bound to give evidence of their goods traffic receipts at the time when the increase was made and previously, and to deal, as they would have dealt under the Act of 1894, with the cost of carrying and dealing with the traffic per ton per mile. They have in fact followed precisely the same lines as if the defendants were seeking to justify the increase under that Act, and, following those lines, their expert witness endeavoured to convince us, on the materials at his disposal, that an increase amounting to something over 29,000*l.* was all that could reasonably be raised. I do not propose to go into the applicants' accounts or into the evidence. In my opinion the accounts are made out on an entirely wrong basis, and the criticisms on the method adopted by the company are entirely unfounded, based upon an erroneous view of the statute.

The first and perhaps most obvious answer to the applicants' contentions is that, if they are sound, the Act of 1913 has not amended the Act of 1894 in any material particular, and the "amending" Act is made entirely useless and of no benefit whatever to the

companies. It was not wanted, if the applicants are right. The applicants' contention imposes upon railway companies the same burden of proving that the increase is reasonable that the existing Act imposed, and the defendants could have justified the increase under that Act. The railway company justified a general increase of rates after the cost of working the traffic had been increased by an improvement in the conditions of labour in the case of *Smith & Forrest* v. *London and North Western Ry. Co.* (1) Wright J. pointed out that the case had been contested on the question of the principle of a general increase of rates. In the applicants' view, therefore, the Act of 1913 has given no concession to railway companies and has made no alteration in the law; the distinction that it draws between passenger and goods traffic is illusory and meaningless, because it makes no change in the law in respect of either. Such a contention appears to me to be quite impossible. It was suggested that as the Act of 1913 said that if the necessary conditions are complied with the Commissioners "shall" treat the increase as justified, an obligation was put upon the Court to allow it, and that in that way the companies obtained an advantage. A strange contention that seems to me—that the Legislature should have solemnly enacted, as a concession to railway companies, that if they proved under the existing law that they were justly entitled to increase their rates the increase should be allowed, and that this enactment effected an alteration in the law. Another suggestion was that the Act gave an advantage to railway companies in that it allowed them to deal with one element only in the rise in the cost of working, namely, improved labour conditions; but, as I have pointed out, they could do that before the Act was passed. No real explanation was ever given of the amendment which the Act had made, and no alternative method of dealing with the matter was or could, I think, be suggested, and in my opinion the criticisms on the defendants' mode of dealing with it were without foundation.

There are other answers, I think, to the contention of the applicants. One is this: The applicants strike the words "resulting from the improvement," &c., out of the Act and read the section as if it said that the company must prove that there has been a

(1) (1900) 11 Ry. & Ca. Tr. Cas. 156, 163.

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rise in the cost of working the railway. Again, the sum that their expert witness arrived at did not result from the improved labour conditions. It resulted from that and other causes not mentioned in the Act. If the traffic and receipts had fallen compared with the previous years, the rise in the cost of working the railway would be represented by a larger sum than the increased sum paid for wages. This, in my opinion, is of itself sufficient to show that their method of dealing with the problem is not what the Act contemplates. Lastly, I would point out that the Act deals with, and was passed for the purpose of dealing with, a particular expenditure (in the shape of higher wages) made once for all, to meet which the power to increase the rates was given. The cases to which the Act of 1894 is applied are, for the most part, cases in which there is a gradual growth of cost as against profit. It is natural enough that in the latter cases the volume of traffic and receipts should be taken into account, but they have, in my opinion, no relation to the subject-matter of the Act of 1913. I quite agree with the applicants' witness when he said that cost is not the same thing as expenditure, in this sense, that larger expenditure may, by leading to a rearranging of the conditions of employment and thereby effecting economies, be wholly, or in part, prevented from causing to those who incur it larger cost in working. But, prima facie, it increases the cost, and there was nothing in the facts of this case to reduce that increased cost. As I have said, no economy or saving was proved.

There is one argument which was used that I ought perhaps to notice. It was suggested that the words "cost of working a railway" have come to have a technical meaning in this Court, and indicate that the various factors to which I have referred and which are considered in order to ascertain whether a rate is reasonable will necessarily be considered in arriving at the cost of working. I disagree entirely with this view. I have dealt with it in effect already. To apply such a rule would make the Act inoperative, and, moreover, it is not correct in law or in fact. The different factors in the problem to which I have referred are no doubt important if the reasonableness of the increase in the rate as such is the question to be dealt with; but the question whether there has been a rise in the cost of working from a specified cause and its

amount does not, in my opinion, involve these. I must also refer to the proviso on which the applicants to some extent relied. It does not, in my opinion, assist them. If it had said that the Court shall take into account any circumstances relevant to the question whether the increase in the rate is "reasonable," it might have been said that the Legislature contemplated that the same kind of questions would arise and the same methods be adopted as under the Act of 1894 where that expression is used; but it has abstained from doing so and has adopted the same expression as appears in the operative part of the section. No contention, therefore, can be founded on the proviso which assists the case of the applicants. For the above reasons I think the method adopted by the defendants is right and that that suggested by the applicants is wrong.

Having attacked the method adopted by the defendants, the applicants then proceeded to question some of the figures in respect to details. It was said that the "shunting miles" were erroneously dealt with, and that if they were rightly dealt with nearly 3500*l.* must come off the 118,588*l.* This was not, I think, made out, and I accept the figures spoken to by the company's witnesses as to this. Then it was said that it was not a fair mode of ascertaining the increase of cost for a year to take one week and treat it as an average week. I do not think that this was unreasonable. To take the figures out for every week in the year would be an intolerable burden and expense, and the week chosen was not, that I can see, other than a fairly representative week. Again it was said that the wages paid to the men employed at the Railway Clearing House were not paid to the railway company's own servants and that these should have been disregarded. But the companies between them contribute to those expenses, and it would have been wrong, in my opinion, to omit them, although this company do not actually employ the staff who work there. Even, however, if the figures should have been reduced by reason of the calculation from the week selected not being strictly accurate or by reason of the Clearing House staff not being employed by the defendants for the purpose under discussion, it is of no real importance. Making all allowance for errors in detail such as these, there is a large margin, far more than sufficient to justify

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the rate. The company have, after making all such allowances, proved, in my opinion, that the rise in the cost of working the railway, excluding passenger traffic, resulting from the improved conditions of labour amounts, approximately at all events, to 120,000*l.*, and, taking all relevant matters into consideration, the 69,000*l.* odd which they have raised in the shape of increased rates was, I think, reasonably required in order to meet that rise in cost.

It remains to consider whether the defendants have satisfied sub-s. 1 (*d*). In other words, is the allocation that they have made in throwing the whole of the 69,000*l.* on to the exceptional rate traffic "not unreasonable"? Now the sub-section does not, I think, require that every kind of traffic shall bear part of the rate. The company, if they do allocate part to one class of traffic and part to another, or if they do what they have done in this case, make all the traffic which is exceptionally dealt with bear the whole of the increased rate, must show that they have not acted unreasonably. Have they discharged that burden? Two points were made on this part of the case which deserve consideration. First it was said that to raise the whole amount of the extra cost and charge on one class of traffic only, the exceptional rate traffic, is unfair, because some of the traders who have their traffic dealt with in this way do not receive all the services which are represented in the extra wages paid. Cartage and warehouse services, for example, form a substantial proportion of the whole of the services rendered to and paid for by the company, and some of these traders are not benefited by either. There is no ground, in my opinion, for saying that the allocation is unreasonable on that ground. Some of these traders did not pay for those services before, because they did not receive them, and a 4 per cent. increase on what they do pay does not involve them in the payment of other services than those they paid for before it was added. The second point is this: Exceptional rate traffic forms a certain percentage of the whole, and it is said that the proportion, or ratio, that it bears to the whole is less than the proportion which the 69,986*l.* bears to the 118,588*l.*, or 120,000*l.*, so that an undue proportion of the whole increase is thrown upon these traders. Although it may be true that the proportion is somewhat less, I think that the allocation is not unreasonable. The reason for omitting the class rates to which

I have referred is a very sound one, as also is the reason for omitting the coal traffic, and I do not think that the Legislature has made it obligatory on the company to observe the exact arithmetical proportion in deciding how to adjust the increased rates. One must look at the matter broadly and see whether there is anything unreasonable in the result under the circumstances. I do not think that the allocation is unreasonable. Any method adopted would probably be open to some criticism. The reason given for the adjustment or allocation appears to me to be sensible and well founded.

For these reasons I think that the defendants have justified the increase in the rate, and the application therefore, in my opinion, fails, and the defendants must have judgment on their counterclaim for the unpaid balance of the rates.

HON. A. E. GATHORNE-HARDY. I have had the opportunity of carefully considering the judgment of the learned judge in this case, and, as I entirely agree both with the construction he has placed upon the Act and with the conclusions of fact at which he has arrived, and his reasons for adopting them, I do not think it would serve any useful purpose for me to go into the facts in any great detail.

On the evidence before us I have no difficulty in finding, as a fact, that there has been such a "rise in the cost of working the railway" (excluding passenger traffic) "resulting from improvements made by the company since August 19, 1911, in the conditions of employment of their labour or clerical staff" to more than justify the increase of rates made, and I think there is nothing in the wording of the Act to fetter our discretion in arriving at this conclusion of fact. I consider, moreover, that the conditions laid down in s. 1, sub-s. 1 (*b*), (*c*), and (*d*), have been fully complied with.

The Act was a remedial one, passed in the interest of the railway companies to meet a special emergency, just as the Act of 1894 was passed in the interest of the traders for a like reason. Its object was to provide a simple method by which the increased cost of labour might be in some degree shared by the traders and the consuming public; and I think it would be both unjust and inexpedient to give it such a narrow construction as would really

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render it inoperative and throw back the companies on the remedy provided by the Act of 1894, which it expressly purports to amend. If there was any evidence that the improved conditions of labour had resulted directly in economies of working which had led to improved results, I should have been ready to take it into account; but there is really nothing to lead to such an inference. Assuredly the Legislature, when it passed these elaborate provisions, must have believed that improvements in wages and conditions of labour would in all probability lead to increased cost of working the railways. I hold that they have done so to the full extent of the rise made.

The learned judge has dealt so fully with the subsidiary points that I have nothing to add.

SIR JAMES WOODHOUSE. The applicants are cement manufacturers in a large way of business. They complain under s. 1 of the Railway Traffic Act, 1894, that an increase of rates made by the defendants is unreasonable. Such increase is part of a general increase, not of all rates, but of exceptional rates for goods traffic amounting to 4 per cent. made by all the railway companies on July 1, 1913, to meet, as they allege, an increase in their expenditure due to higher wages paid and shorter hours conceded to their employees. The defendants by their pleadings justify the increase, first, on the ground that it comes within the special provisions of the amending Railway and Canal Traffic Act, 1913, and, secondly, on the ground available under the Act of 1894, that, if regard be had to all the circumstances, it is reasonable. At the hearing the defendants based their case justifying the increase exclusively on the first ground. As this is the first case since the passing of the recent Act upon which the Court has to pronounce judgment, and as there are a very large number of cases, affecting nearly every staple trade in the country, pending before the Court raising similar issues, the interpretation to be placed upon that Act and the nature of the proof required from the railway companies under it are of vast importance, especially to traders who are dependent upon the railway companies for the nature of the material and the accuracy of the figures establishing the justification.

The Act of 1913 was passed to amend the Act of 1894. By s. 3

it was enacted that it should be read with the Railway and Canal Traffic Acts, 1873 to 1894. It has therefore become embodied in, and must be regarded as part of, the general railway legislation. No part of the Act of 1894, except by implication, has been repealed. The Act of 1913 being an amending Act, it becomes not unimportant (as the parties fundamentally differ about its construction), in ascertaining precisely what amendment it introduced, to consider what were the circumstances which gave rise to such amendment. In order to appreciate this, regard must first be had to the Act of 1894, to the interpretation placed upon it by this Court, and to the considerations applied and the proofs required in giving effect to that interpretation.

Prior to the passing of the Act of 1894 all rates below the maxima prescribed by the statutory charging orders were presumed to be reasonable. That Act took away this presumption and restricted the power of the railway companies to increase their rates, even though they were below the maxima, by requiring them to show to the satisfaction of this tribunal that any such increase was in fact reasonable. No standard or test of what was to be deemed "reasonable" was indicated in the statute; it was left entirely to the Court to evolve the considerations and principles to be applied in deciding, in the exercise of its judicial discretion, what was reasonable. In practice, increases of rates were sought to be justified by showing an increase in the general working cost of the railway affected. The Court laid down that what it had to decide was, not whether the rate was reasonable, but whether the increase was reasonable; and, in order to justify the increase of a particular rate, it was not sufficient for the railway company to show a general increase in the cost of working the railway, but it was necessary to prove that the cost of the particular service relied on in working the particular traffic to which the specific rate complained of referred had increased: *Black & Sons* v. *Caledonian Ry. Co.* (1) The onus was thus placed upon the company of showing that since the rate had been in force there had been some "change of circumstances" which imposed a greater burden upon the company, and that that greater burden affected the particular traffic under consideration. As there was no analytical separation in the books

(1) (1901) 11 Ry. & Ca. Tr. Cas. 176.

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of the railway company of expenditure showing what was the cost of working a particular traffic, and, indeed, no separation of goods and passenger working at all, the method of proof resorted to was a most complicated and laborious one, and involved a difficult and unsatisfactory investigation for the Court. As evidencing a general rise in the cost of working, reliance was placed by the railway companies upon the ratio method of comparing, in the contrasted periods, the percentage which aggregate expenditure bore to total receipts. The apportionment of these figures between passengers, goods, and minerals on the basis, as to part, of train mileage, and, as to other part, of gross receipts, in order to ascertain the ratio of particular traffic expenses to particular receipts, involved calculations and tables of a most complex character. This method, as the Court has frequently pointed out, is very sensitive to error, as the introduction of the slightest disturbing element on either the receipt or expenditure side of the account altered the ratio, subjected the process to much suspicion, and only made it acceptable after the closest scrutiny and because no better method could be suggested. Much of the difficulty no doubt arose from the fact that railway accounts were only kept in the form necessary to satisfy the statutory provisions of the Railway Accounts Act. Such accounts were very insufficient and afforded very little assistance in solving the issues which arose under the Act of 1894. The old statutory tables contained practically only two elucidating factors (first the percentage of expenses to gross receipts, and secondly the number of train-miles), which fell far short of what was required to be known, to arithmetically determine the real cost of transportation. Cumbrous and dubious as was this method of solving the problem, no better one was ever suggested or devised, and the Court had to arrive at the best judgment it could, after listening to all the adverse criticisms which eminent counsel and expert statisticians on behalf of traders could offer for their consideration. Nor do matters appear to have been very much improved by the new form of accounts prescribed by the Railway Accounts Act, 1911. In that year (1911), owing to the railway companies refusing to concede the demands of their employees, the great railway strike took place. It is notorious that the Government, who were at that juncture face to face with a serious

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crisis, both national and international, intervened and made strenuous and successful efforts to bring the strike to an end. The representatives of both parties came to terms, and in connection with the settlement the Government promised the railway companies to introduce a Bill to amend the Act of 1894. The present Act, passed nearly two years afterwards, was the outcome of that arrangement. We have now to interpret what it means. I confess I have felt not a little difficulty, judging from the ambiguous language of this statute, in discovering what the real intention of the Legislature was. It is obviously on the face of it an attempt to harmonize and embody two conflicting views—those of the companies and those of the traders who strenuously opposed it. This amending Act deals with the same subject-matter as s. 1 of the Act of 1894, i.e., complaints as to "any increase of any rate"; but, as its amplified title denotes, the only increase of rate which comes within the scope of its provisions is one due to improvements in labour conditions. There is nothing in the Act to limit its operation to the emergency concessions made at the time of the strike settlement in 1911 or in the subsequent year. Whatever be its effect, it is not transitory but permanent in its operation; it applies not only to concessions then made, but to all future increases of rate occasioned by a reduction of hours or increase of wages affecting the labour or clerical staff. It enacts that on any complaint as to any such increase, in order to justify it, the railway company must prove: (*a*) that there has been a rise in the cost of working the railway due to improvements in the conditions of labour made since August, 1911; (*b*) that, in ascertaining such cost of working the railway, all the cost of carrying and dealing with passengers has been excluded; (*c*) that the whole of any particular increase complained of is part of the above general increase; (*d*) that the increase of rate is not "in the whole" greater than is reasonably required to meet the said rise in cost of working the railway; (*e*) that the proportion of the increase allocated to the particular traffic, with respect to which the complaint is made, is not unreasonable. There is a material proviso in the section, which I will deal with subsequently.

The first question is, What is meant by the expression "rise in the cost of working the railway" due to improved labour

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conditions? It is the first time the expression "cost of working the railway" has found its way into railway legislation, but it has been a common formula in the discussions before this tribunal when hearing complaints under the Act of 1894, and it has received judicial examination and interpretation with which the Legislature must be assumed to have been familiar. Under the term "cost of working" are included such elements of expenditure as (*a*) coal and fuel, (*b*) labour, (*c*) maintenance of permanent way, (*d*) repairs and renewals of rolling stock and engines, (*e*) general traffic expenses chargeable to revenue. But expenditure and cost in this connection must not be confused. They are not convertible terms. Expenditure is a debit factor—it refers to outlay only, and is absolute. Cost is a resultant and comprehensive factor, and is relative. It embraces economies made, as well as money expended. Part of the expenditure of operating a railway consisting of fixed and certain charges is constant, another and greater part, including fuel and labour, is variable, and it is obvious that it must vary with the volume of traffic worked. Cost is unknown until volume is ascertained, and volume is always fluctuating. The business of a railway company is that of carrying and handling traffic. That is the object or purpose for which rates are charged. This is clear from the words expressly excluding passenger traffic from the purview of the amending Act, the words being "excluding the cost of carrying and dealing with passengers." The great bulk of these rates are in the statutory charging orders measured in money in relation to weight and distance—that is, in tons and miles. It is axiomatic that each ton of freight added to the existing traffic costs relatively less to haul. The cost of working grows less rapidly than the volume of business done. Neither fuel nor labour expands pari passu with the paying load. Similarly the rate of increase of earnings per mile is much greater than the increase of expenses. To ascertain, then, the cost of working a railway in comparable periods, some relative standard, or unit, of comparison must be taken. As Collins J. said in *Rickett, Smith & Co.* v. *Midland Ry. Co.* (1), "The expense at which traffic is carried must be a relative figure, and, being relative, I think that its relation to receipts in two contrasted years may afford a fair comparison, unless there be some

(1) [1896] 1 Q. B. 260, 269.

disturbing element to upset the calculation." In that case the railway companies, to compare the cost of working, adopted the ratio of expenditure to gross revenue as their best unit of comparison. In this country in all railway accounts and at all railway meetings it has been taken as the invariable standard. In this Court efforts have been made to apply other tests, such as that of tonnage carried, and the train-miles operated; but invariably, for the purpose of ascertaining whether or not there has been a rise in aggregate working cost between two contrasted periods, one or all of these units of comparison have been examined and compared. Such was the basis of comparison as exemplified by Wright J.'s judgment in *Smith & Forrest's Case.* (1) It is, of course, one of the difficulties inherent in the system on which the railway companies keep their accounts that they cannot present such statements of cost with arithmetical accuracy, but they can only estimate them approximately.

Now, Mr. Talbot, for the railway company, contends that the amendments the Act introduced were (1.) to enable a general increase of rate under ascertained circumstances to be made, and (2.) that the machinery or method for ascertaining those circumstances and justifying the increased rate was different machinery from that used under the original Act. So far I agree; but the issue turns on how the machinery differs, and that depends on the construction to be placed on the Act. As was well established under the prior Act, the increased cost of any particular element—be it, e.g., coal (as in *Black's Case* (2)), or be it labour, which formed the real ground of justification for an increase of rate (whether the rate be of general or particular application)—must be related to and proved in respect not of the entire traffic, but of the particular traffic to which the complaint related. This, as I have stated, was a matter of enormous trouble and complexity. What the railway companies desired was to simplify the machinery for increasing their rates by being relieved, if they could, of relating their working cost to any particular traffic, or any particular portion of their railway, so as to limit their arithmetical analysis as regards labour to their traffic as a whole. I think that the amendment the Act introduced carried out this object and made it sufficient if the railway company

(1) 11 Ry. & Ca. Tr. Cas. 156. (2) 11 Ry. & Ca. Tr. Cas. 176.

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primarily proved what the rise had been in the working cost of labour with respect to its entire traffic, which was a very different proposition and one capable of very much simpler proof. How traffic fluctuated from one period to another and varied in particular districts was evidenced by Mr. Gresley, the railway company's chief locomotive engineer. In some districts of a railway system he said it is up, in other districts it is down. These variations (if my view be correct that cost varies with the work done, that is, with its volume and density) would make the percentage of cost of service on a portion of the traffic entirely different from what it would be relatively to that of the entire traffic. Again, the defendants are restricting this increase of rate to what is known as exceptional goods traffic, excluding ordinary class-rate traffic, coal and coke traffic. The exceptional rate traffic, we are told, constitutes about 80 per cent. in volume of all goods traffic and 69 per cent. in money value; but, as admitted by Mr. Jepson, the able and experienced traffic manager of the London and North Western Railway Company, class-rate traffic is more expensive to work as regards labour than is exceptional rate traffic. Under the original Act this working cost would have had to be gone into in detail and the exact cost brought home, in the manner I have previously described, to the particular class of traffic. You now use simplified machinery of proof, limited as regards elements of expenditure to labour, and as regards traffic to the entire traffic (excluding passengers) as distinct from a particular traffic. That is the relief and benefit which the railway companies obtained under the Act; and only those who, like myself, for some years have had to adjudicate on these cases can properly appreciate what a real advantage to them it is. I have dwelt on this because it is asked, if the railway company's method of bringing themselves within this section is not accepted, what benefit have they obtained? In my view a very substantial benefit, by being relieved of the onus of showing the effect, so far as labour is concerned, in regard to a particular rate or on particular traffic, of its actual cost.

Now, for the applicants it has been argued with great force and clearness by Mr. Gregory that under the Act of 1913 the company must first prove what has been the entire general cost of working the railway (excluding the cost of passenger traffic); secondly,

that there has been a rise in such general cost of working; and, thirdly, that that rise has been due to improved labour conditions. The effect of this would be that the Court might find that, whilst the labour cost had risen, the cost of other operating elements had fallen to such a degree that there was no rise, in comparable periods, in the general working of the railway, which, therefore, would preclude the railway company's right to any increase. Though a possible construction, I think it is not the true construction of the section.

The wage element is all we have primarily to deal with. Has there been a rise since 1911 in the cost of working due to improved labour conditions, in other words, to an increase of wages? The Act cannot mean merely the rise in the aggregate extra payments to labour in any period compared with the corresponding period in 1911, because the aggregate must obviously depend on the volume of work done. It is not a rise in mere expenditure that we have to deal with, but a rise in the cost of working. It is clear that there may be a rise in the cost of working the railway resulting from a particular cause, namely, improvement in labour conditions, although, owing to economies in other directions,—e.g., improvements in methods of working, or the fall in price of coal or other materials, or reduced mileage—the aggregate cost of working the railway may have diminished. It is also equally clear that, notwithstanding improved conditions, there may be a fall in the cost of labour, though, owing to the rise in fuel or other elements, the aggregate cost of working the railway may have increased. Let me, simply by way of illustration, take examples collected from the published returns of the leading railway companies for the second half-years respectively of 1911 and 1912, when what I call the emergency concessions had become operative. The comparison for the first half of 1912 would not be in point, as the disturbing element of the great coal strike took place in March and April, 1912. For convenience of reference these figures are tabulated in *The Times* of February 10, 1913. Take the last point first. On the North Staffordshire Railway the percentage of total expenses rose from 60·57 in 1911 to 62·40 in 1912, whilst the ratio of wages and national insurance fell from 25·21 in 1911 to 25·05 in 1912; but the cost of fuel rose from 3·97 to 4·48. On the Great Central the total expenses

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fell ·90 per cent.; wages fell from 34·01 to 33·36; but fuel increased from 7·06 to 7·60. On the North Eastern the total expenses fell from 62·39 to 61·86, whilst wages fell from 27·03 to 26·83, though fuel increased from 3·75 to 4·29. These figures do not, of course, separate the expenses of passenger traffic from that of merchandise; they deal with the railway as a whole; but they are illustrative of the observations I have made, and it is solely for that purpose I refer to them. But if, on the proper interpretation of the Act, the railway company must show that the cost of working has risen since 1911, the comparison must be made, not on the basis of aggregate cost, but on unit cost in some form. What the Act, I think, means is that the railway company must primarily show that the same amount of traffic has cost the company in labour more to work. It must, as Lord Collins said, be a relative figure. The rise in the cost of labour must be viewed relatively to the volume of work done, i.e., to the tonnage carried, to the train-miles run, or to the ratio which such increased expenditure on labour bears to gross receipts. There must be some criterion or standard of measurement, or some unit for comparison, between 1911 and the latter period. The subject-matter is traffic; it is a variant, not a constant. If it were a constant, then the method of arriving at a result would be simpler. You measure the working cost of labour by ascertaining how much it cost you in labour in 1911 to carry and handle a ton of goods on your railway, or how much it cost you in labour to earn 100*l.* of receipts. If in 1913, taking the same unit, it cost you more, then to the aggregate extent of that rise in the cost of working the railway due to labour improvements you may make a general increase of rate. Suppose, as a rough illustration, it cost in labour 1*d.* to carry a ton of goods a mile in 1911, and it is shown that in 1913 it costs, owing to improved conditions, 1¼*d.*, that would prima facie justify an increase of 25 per cent. There would be a definite ascertained rise in the cost of working, i.e., in carrying the traffic.

As the real question at issue in this case is one of principle, namely, that of the proper interpretation of the amending Act, I purposely abstain from going into the figures more than is necessary, or of dealing with "allocation" under sub-s. 1 (*d*). If the view I have stated be correct, as I think it is, we admittedly

have not had placed before us by the defendants the necessary material upon which to arrive at a judgment. We have not got, for example, the actual wages paid by the railway company in 1911 and 1913 respectively for traffic (other than passenger traffic), which in my view are essential to relate the volume of traffic to tonnage or revenue, so as to show the rise in the cost of working due to labour improvements. On the last day of the hearing the company did put in a statement which showed that their gross earnings between 1911 and 1913 had increased 495,956*l.*, or 7·69 per cent., and that the gross wages had increased 217,075*l.*, or 9·18 per cent. This statement showed that the ratio of gross wages to gross receipts advanced from 36·63 per cent. in 1911 to 37·14 per cent. in 1913, or ·51 per cent. This rise in the labour cost of working the railway, as tested by the ratio of expenditure to receipts, so far as figures supplied by the railway company are concerned, is the only test from them which we have. These figures are, however, quite insufficient for the purpose of justifying the increase of rate under the Act. In the first place, they do not exclude, but include, passenger working; and, in the next place, they include figures relating not only to carrying and dealing with traffic, but to all businesses of the company, including those of canals, hotels, and warehouses. What the figures are relating to the relevant factor under the Act the railway company do not give, and they say they can only give them with an immense amount of trouble; but, whatever be the trouble (which I think is a good deal exaggerated), they are to my mind essential to the ascertainment of the proper facts upon which the real determination of the issues depends.

The defendants interpret the Act in a different way. They in effect say that what was intended was to standardize the price of labour in August, 1911. (I say price, because whether the hours worked are shorter or longer they are expressed in the equivalent of money.) Thus they ascertain how much per hour they pay signalmen, how much engine-drivers, how much firemen, &c., according to the standard and conditions of 1913 in one particular week, and multiply the results by 52. They find a man worked so many hours; of those hours they ascribe so many to ordinary pay and so many to overtime pay; with this they compare and

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contrast what they would have paid the same man working in the same grade under the conditions of 1911 at the prices then prevailing, when the relation of ordinary time to overtime was quite different. The aggregate difference when thus ascertained represents, in their view, the increase in cost of working resulting from labour improvements; and in the event of increased traffic involving the appointment of additional men, the railway company, it is claimed, are under the Act entitled to recoup themselves for any increase of wages paid to these additional men over the standard of 1911, although they get the benefit of increased receipts from the carrying of additional traffic. Thus whether traffic increases or decreases, whether receipts rise or fall, whether the result of working the railway is more prosperous or less prosperous, becomes, according to their view, immaterial. The sole question involved (according to this view) is, Are we paying at a higher rate per hour for our particular grade of employee than we were paying in 1911? If so, then the sum of the differences represents the increase in cost of working which we are entitled to get back in increased rates from the trader. If they establish the above fact, it is according to their contention mandatory on the Court to allow it. This was the view, as I understood it, pressed upon us by Mr. Talbot. I cannot understand why, if this be the simple view intended, the Legislature did not find less ambiguous language, having regard to the discussions before this Court as to the cost of working, in which to express it. But, as I have said before, the payment of an increased scale of wages does not necessarily increase the cost of working. It does not necessarily do so when the subject-matter, namely, the work done, is constant; still less so when that work, as in the case of a railway company, varies.

Let me take a simple illustration. Suppose A. has a large garden with extensive lawns which are mown by hand machines and that ten men are employed at wages averaging 1*l.* 5*s.* each, amounting in the aggregate to 12*l.* 10*s.* a week, or 650*l.* per annum. A. decides to improve the condition of his workmen by giving them each 3*s.* per week extra; but, being desirous of not increasing the total cost of working his garden, resolves to buy a motor lawn-mower, by which, with three fewer men in less time, he can do what he did before. He pays seven men an additional 54*l.* 12*s.* per annum;

but owing to the reorganization of his labour and the introduction of a labour-saving machine he has been able to reduce the aggregate labour cost from 650*l.* per annum to 509*l.* 12*s.*, or by 140*l.* 8*s.* per annum; and, after debiting a sum for interest on capital expended on the machine and its depreciation and upkeep, his total outlay is less. Here there have been increased wages paid in respect of the labour actually employed owing to increased scales of pay, but there has been, on the actual facts, no rise in the cost of working. All the railway company do is to place before the Court the number of men employed in a particular week in 1913 and price out their wages under the conditions of 1913, and say, assuming the same number of men had been working the same number of hours in 1911, they would have been paid so much less, and the estimated difference, when multiplied by 52, shows an increase which represents the rise in cost of working. The objection is taken that this is an artificial and misleading method of arriving at the result required to be known, and I think it is. It does not deal with or show what is the actual state of things in 1911 at all. An illustration of this was exemplified by one of the defendants' tables showing the increase in the locomotive department, where on investigation it was shown on the face of the table that whilst 308 men in 1911 were getting 830*l.*, 314 men in 1913 were getting only 806*l.*, notwithstanding the increased scale of pay. The explanation made by Mr. Gresley, the company's engineer, is that more work must have been done in 1911; but that gives point precisely to the criticism that you cannot accept the defendants' method of establishing a rise in the cost of working without knowing other factors which are not disclosed.

I agree with Mr. Fels, an experienced railway accountant called by the applicants, that scales of pay not infrequently determine practically the quantum and, therefore, the cost of labour employed, and a useful table put in by him shows how this might operate in practice. If labour is dearer, a business man tries to see whether he cannot so organize his business as to reduce its cost without diminishing the product.

This was evidently the idea which the chairman of the defendant company, one of the most painstaking, practical, and prescient of railway chiefs, had in his mind when, according to the evidence,

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he said to his shareholders in 1912, apropos of increased wages, "The company would have to pay a great deal more in wages, and it would inevitably impose upon the general manager and all concerned the duty of finding and using all expedients to effect economy in labour." This was not the expression of a pious hope; it was the business man's determination to face the actualities of the situation; and, coming from such a source, it will be surprising if it is not reflected in the results when figures, which are not yet forthcoming, are presented, as I think they should be, for investigation. To compare one period with another to see whether his labour in the later one is costing him, notwithstanding higher prices, more or less than in the former, the business man deals with the actual facts as they are, and does not seek to ascertain what would have been the fact if he had applied present conditions to a former period of working. What was the actual labour cost in 1911? What were the actual wages paid for the carrying and dealing with the traffic in question? What were they in 1913? What was the tonnage carried? What were the miles operated? What were the receipts obtained? To ascertain whether the working cost of traffic has increased you must know the relative volume and density of the traffic in the contrasted periods and the receipts derived from it; and these facts have certainly not been shown.

But whichever be the right view of this section, the proviso in s. 1 has still to be considered. It was argued by the defendants' counsel that it had no effect and should be regarded as surplusage, on the ground that the Court would, in any event, take all relevant circumstances into consideration. But I think it has a very important bearing on the interpretation to be placed upon the Act. This legislation is so recent, and was the subject of so much controversy, that one cannot shut one's eyes to the fact, well known to all who followed the course of events, that this proviso (as is apparent on the face of it) was introduced at the instance of, and for the protection of, the trader. It relates by its very terms, not to a lettered sub-section as was suggested, but to the whole preceding enacting words of the section, and was obviously intended to have a limiting effect upon it. That limiting effect was, in my humble opinion, to retain in the Commissioners the same right

and to impose upon them the same duty, when determining what was reasonable in reference to the quantum of the increase as regards general increase of rate to meet increased cost of working due to labour improvements, if established, under the amending Act, of considering such general circumstances as had been deemed relevant when considering whether an increase was reasonably required under the original Act. Under this proviso the applicants would be entitled to show, and the Court to consider, whether there were not compensating circumstances resulting from increased expenditure on labour, such as the productivity of the labour involved and any economy thereby effected; and it would be open to the Court to consider, and in its discretion to determine, whether, though in fact labour expenditure had risen, yet the general cost of working the railway had so fallen, that to put on the trader so large a cost as proposed was not a reasonable requirement. Mr. Talbot contended that it was neither the right nor the duty of the Court to entertain under this Act the economic factor at all. Again, suppose the rise in expenditure on labour was not directly connected with working the railway, that is, with the cost of carrying and dealing with traffic, or earning the receipts, but was due to some sudden unforeseen and non-recurrent factor happening only in one year or in two of a series of years; or was due to some experimental and unproductive purpose, and did not concern the regular machinery of working, would not those be relevant circumstances which the Court should consider?

It should not be forgotten that, in this country, rates are not made upon any scientific or mileage basis, but on a purely artificial basis. They are not based on the cost of service; they are based on the commercial value of the service, that is, according to what the traffic will bear. Thus, whilst a small percentage increase on high class traffic will not relatively be seriously felt, when you come to deal with a low grade traffic like cement, a small addition may make all the difference between a working profit and a loss. Such circumstances in my view are very material and relevant circumstances from the business point of view in ascertaining whether (though there has been a rise in the cost of working as regards labour) the increase of rate made by the company is, or

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is not, greater than is reasonably required for the purpose of meeting such rise.

From the way the defendants' justification was presented to the Court, the restricted character of the proof, and the limitations contended for, it was obviously directed to forming a guiding precedent in all future cases. This is a Court of law which sits to determine legal rights and obligations in accordance with legal principles, but it is also a business tribunal, which ought not to ignore the principles of railway economics. It is because I feel convinced that it would be unsound in principle and unsafe in practice to accept the defendants' construction of the statute, as exemplified by their method and argument, that I have come to the conclusion that they have not discharged the onus which rests upon them, and that on this application the applicants are entitled to succeed.

*Application dismissed.*

F. O. R.

The applicants appealed.

April 5, 6, 7. *Rowland Whitehead, K.C.*, *Holman Gregory, K.C.*, and *Edwin Clements*, for the appellants. The Commissioners, in accepting the evidence of the railway company as sufficient under the Railway and Canal Traffic Act, 1913, have not rightly construed that Act. The evidence which they accepted as justifying the increased charge of 4 per cent. upon all the rates charged to the appellants for the carriage of their cement is not the kind of evidence which the Act requires. The rates charged to the appellants are "exceptional rates" as opposed to class rates. On July 1, 1913, the railway company raised the whole of their exceptional rates, and they are called upon to justify that increase. The Commissioners, in dealing with cases under the Act of 1894, have always required that the railway company should show, in justifying under s. 1 of that Act, that there has been a change of circumstances affecting the traffic in question since the original rate was established, and that that change of circumstances justifies the amount of the increase imposed. That section was amended by s. 1 of the Act of 1913, which was passed in consequence of the great railway strike in 1911. Under the Act of 1913 what the railway company

has to prove to the satisfaction of the Commissioners is (1.) that there has been a rise in the cost of working the railway resulting from improvements made by the company since August 19, 1911, in the conditions of employment of their labour or clerical staff; (2.) that the whole of the particular increase of rates complained of is part of an increase of rates made for the purpose of meeting the rise in the cost of working; (3.) that the increase is not greater than is reasonably required; and (4.) that the proportion of increase allocated to the particular traffic with respect to which complaint is made is not unreasonable. The railway company, in endeavouring to justify the increase complained of, tendered evidence to show the amount of wages paid in the week ending June 28, 1913. They then contrasted that with what would have been paid to the men employed in 1913 if they had worked for the same number of hours on the scales of pay which were in force in 1911. They therefore contrasted an actual figure with what we contend was an estimate and a hypothetical figure. They contend that the increased expenditure thus arrived at is the same thing as "a rise in the cost of working" within the section. In effect they treat "expenditure" and "cost of working" as synonymous terms. We submit that in order to ascertain whether there has been an increase in the cost of working the work performed must be taken into consideration. The working of the railway is not a constant factor; it changes every year, every month. The work performed is determined by the amount of traffic to be dealt with. The problem of ascertaining the cost of working is not merely arithmetical, but is one of railway economics. It is the same sort of problem that the Commissioners had to consider under the Act of 1894. The Act of 1913 no doubt limits the scope of the inquiry to the one factor of the improvement in the condition of the employment of labour. It is necessary to start from the basis that there has been a change in the scale of pay, and pursue that into the actual administration of the railway company as a going concern and find out whether there has been a rise in the cost of working.

The following cases under the Act of 1894 show the method in which the Commissioners approached the problem of ascertaining whether the increase was reasonable, and the sort of factors which

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they considered in dealing with it:—*Rickett, Smith & Co.* v. *Midland Ry. Co.* (1); *Charlaw and Sacriston Collieries Co.* v. *North Eastern Ry. Co.* (2); *South Yorkshire Coal Owners' Assurance Society* v. *Midland Ry. Co.* (3); *Smith & Forrest* v. *London and North Western Ry. Co.* (4); *Society of Coal Merchants* v. *Midland Ry. Co.* (5) Parliament by the Act of 1913 directed the Commissioners to give attention to one factor in the cost of working, namely, the labour factor, but, when dealing with that one factor and considering it from the point of view of the general cost of working a railway as a whole, Parliament intended the Commissioners to ascertain how it affected the cost of working in the same way as they had previously tried to see how the more numerous factors which they had to consider under the Act of 1894 had affected the cost of working. Although by the Act of 1913 the problem whether there had been a rise in the cost of working was narrowed to the extent of being confined to that one factor, it was still a problem of the same nature as that which the Commissioners had to consider under the Act of 1894. *Ex parte South Eastern and London, Chatham, and Dover Ry. Cos.* (6) was one of several cases not under the Act of 1894, but under Acts which gave the Commissioners power to adjudicate as to whether an increase of rate is reasonable. *Ex parte Great Southern and Western Ry. Co. and Ex parte Fishguard and Rosslare Railways* (7) was a similar case tried in Ireland. Those cases show that the Commissioners, in approaching the problem "cost of working," have under the Act of 1894 considered all the factors affecting the cost of working the railway as a whole. Their method has been to assess the cost of working the railway in relation to the particular traffic by comparing the ratio of expenditure to receipts in one year with a similar ratio in the contrasted year. The Act of 1894 is still in force, and what the Act of 1913 did was to amend in favour of the railway company the procedure of justification in the Commis-

(1) [1896] 1 Q. B. 260.
(2) (1896) 9 Ry. & Ca. Tr. Cas. 140.
(3) (1897) 10 Ry. & Ca. Tr. Cas. 28.
(4) 11 Ry. & Ca. Tr. Cas. 156.
(5) (1909) 14 Ry. & Ca. Tr. Cas. 100.
(6) (1913) 15 Ry. & Ca. Tr. Cas. 154.
(7) (1914) 15 Ry. & Ca. Tr. Cas. 282.

sioners' Court where the increase of rate complained of was caused by one particular factor, namely, a change in the conditions of labour.

The main issue in this case is, Was the kind of evidence which the railway company relied upon in justifying under the Act of 1913 the kind of evidence which the Act requires? Under the Act of 1913 that evidence was to be directed to a certain matter, and in this case no evidence has been directed to that matter. The Court below was wrong in treating the kind of evidence given by the railway company as being the evidence required by the Act, namely, evidence relating to "the cost of working the railway." "Cost" is a relative term and means expenditure in relation to output or to services performed. All that the evidence of the railway company purported to show was an alteration in the amount of money expended on labour in the two contrasted years. "Cost of working" ought to be construed having regard to the practice of the Commissioners' Court in dealing with cases under the Act of 1894.

*Sir J. Simon, K.C., G. J. Talbot, K.C.*, and *W. Bruce Thomas* (for *Hamilton Conacher*, serving with His Majesty's Forces), for the respondents. The questions raised upon the decision of the Commissioners are issues of fact. Under s. 17 of the Railway and Canal Traffic Act of 1888 there is no appeal except upon matters of law, and it is the presiding judge who has to decide questions of law. It is material to inquire for what purpose the year 1911 is mentioned in s. 1, sub-s. 1 (*a*), of the Act of 1913. It is not for the purpose of comparison between that year and some subsequent year, but for the purpose of securing that a railway company shall not claim any advantage from improvements in labour conditions unless they have taken place since August 19, 1911. The year 1911 is not mentioned as a point from which it is necessary to calculate for the purpose of arriving at receipts or gross takings or matters of that kind. It is nothing more than a date given for the purpose of defining the improvements which may be taken into account. Those improvements are of two classes, one class having nothing to do with increased cost, the other being improvements which do affect the money conditions of the company with regard to its labour.

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It is said that a rise in the wages bill does not prove a rise in the cost of working. If the traffic be the same it does. The company first of all show what the actual traffic of the year in question costs in respect of wages on the basis of the improved conditions, and, secondly, what that same given traffic would cost if wages were paid according to the old scale. It is a fallacy to say that the company in thus calculating is not having regard to the relation between wages on the one hand and traffic on the other. It follows that the difference between the two wages bills actually represents the rise in the cost of working the railway resulting from the improvements in question. The figure arrived at is not a comparison between one year and another, but a comparison between what was paid for wages in one year and that which would have been paid in that same year under the old rates. The Act of 1913 was designed to enable the companies to recoup themselves, not by some elaborate comparison between traffics in one year and another, as was the case under the Act of 1894, but by making the simple calculation: how much was it costing the companies to work their railways so far as staffing was concerned at the time when they raised the rates, and how much less would it have cost under the old conditions? With regard to the proviso in the section, the submission is that it does not assist either party.

*Rowland Whitehead, K.C.*, in reply. The whole question is What is the meaning of the words "cost of working the railway"? The submission is that it means the relation existing between the expenditure and the work performed. The respondents have not adduced the kind of evidence required by the Act of 1913 to enable them to justify the increased rates.

*Cur. adv. vult.*

April 14. LORD COZENS-HARDY M.R. read the judgment of the COURT. (1) This appeal raises a question of far-reaching importance as to the true effect of the Railway and Canal Traffic Act, 1913. It is desirable to consider the material provisions affecting traders and railway companies prior to 1913. Under the Act of 1894 a railway company which after December, 1892, increased a rate or charge was bound, in the event of a complaint being made by

(1) Lord Cozens-Hardy M.R., Phillimore L.J., and Sargant J.

a trader, to prove that the increase of the rate or charge was reasonable, and it was not sufficient to say that the rate or charge was within the fixed limit of charge. The burden of proof was thrown upon the railway company. In order to justify the increased charge it was usual for the Commissioners to consider all the circumstances of the railway at the time when the increase was made, including the receipts of the railway and the expenditure of the railway. The method usually adopted was to ascertain at each of the two periods the cost of carrying the traffic per ton per mile and the relative resulting receipts. This obviously involved an extremely elaborate calculation. It allowed the setting off against one increase of expenditure of a saving on another item. For example, if expenditure on labour had increased but the cost of coal had diminished, the company could not succeed to the full extent of the increase of the labour bill without allowing for the saving on coal. The Act of 1894 was on its face designed for the benefit of traders, and the task imposed upon the railway companies, and also upon the Railway and Canal Commissioners, was very heavy. In 1913 it appears on the face of the Act that the railway companies had made improvements in the conditions of employment of their labour, or clerical staff, and the Act was obviously designed for the benefit of railway companies with reference to an increase of their charges for goods traffic. This appears on the face of the Act itself. It has been stated by counsel on both sides, and it is a matter of general public knowledge, that a great strike on the railways in this country was averted by the grant of certain improved conditions upon a promise by the Government to introduce a Bill the effect of which might be to enable the railway companies to throw the whole or part of the extra cost upon the traders. It is not necessary to consider whether all this can properly be taken into consideration in construing the Act. The Act itself contains sufficient for the purpose.

Before reading the words of the Act it is well to point out one or two matters. In the first place the Act has no reference to improved conditions prior to August 19, 1911. This is the sole object for which August, 1911, is inserted in the Act. In the second place it excludes the general investigation which was customary under the Act of 1894. In the third place the Act of

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1913 is to be read with the Act of 1894, and the provisions of the Act of 1894 remain in force except so far as modified by the Act of 1913. [The Master of the Rolls read s. 1, sub-s. 1, of the Act of 1913, and continued :] This section imposes upon the Commissioners the obligation to allow an increase of the charge provided the four conditions there specified have been satisfied. There follows a proviso which, in our opinion, does not assist either side.

The Great Northern Railway Company increased their rates on what is called " exceptional " traffic by 4 per cent. as from July 1, 1913. No point is made on the ground that the increase is limited to " exceptional " traffic. The traders have complained, and they contend, that the increased rate is not justified, or rather that the railway company have not adduced any evidence on which the Commissioners could come to the conclusion that the conditions precedent, and particularly condition (*a*), have been satisfied. The Commissioners by a majority allowed the increase.

Two views have been put before us as to the meaning of the section. On the part of the traders it is argued that the phrase " cost of working " the railway is a term of art referring to the previous practice under the Act of 1894, that it involves many other factors besides the labour bill, and that it necessitates a comparison between two periods, namely, 1911 and 1913, including in particular actual receipts and actual expenditure at each of the two periods, and that, unless such evidence is furnished, the Commissioners have no justification for sanctioning any increase of rates. On the other hand it is contended by the company that the task imposed upon the railway companies and upon the Commissioners may be discharged in a much more simple manner, such as the following, which is the method adopted by the Commissioners in the present case. Take the actual figures in July, 1913, and see how far the work then done by the railway company in connection with goods traffic has cost more than it would have cost if the conditions had not been improved since August, 1911. Lush J., with whom Mr. Gathorne-Hardy agreed, took the latter view, and in our opinion it is the correct view. It seems to us that the isolated problem presented by the Act of 1913 does not involve, and in truth excludes, the general comparison which has to be made under the Act of 1894. The company deliberately omitted

to furnish any such evidence as would be necessary to justify an increase under the Act of 1894 based in some form or other on a comparison of two periods, and in our opinion they were right in so doing. It has not been attempted to work out figures with exactness, but a great number of instances have been taken, and typical specimens have been selected for the purpose of the argument. For example, Spalding has been taken as a station in a particular week in 1913; the number of the staff employed for the purpose of goods traffic is given; the wages paid, including payments for overtime and Sunday labour, are stated; and it is then stated what payments would have been made to these men doing this very work if the 1911 conditions had been in force, and the result is worked out. We should add that the improved conditions include an actual increase of pay for a standard day and also a diminution in the hours of a standard day. It is said that there is a fallacy in taking the increase of the wages bill as a true test because the labour may be more efficient by reason of the improved conditions, and there may be various economies effected. In point of fact the evidence is clear that there have been no such economies. It may theoretically be true that the improved conditions may, in the case of certain individual workmen, make them more energetic and better workmen. This, however, is not a practical consideration, dealing as we are with some 20,000 workmen, who are, speaking generally, the same as they were before.

Assuming the general principle submitted by the railway company and adopted by the majority of the Commissioners to be correct, the increase of 4 per cent. is reasonable, after allowing a considerable margin for errors.

It must never be forgotten that the Commissioners are the sole judges of fact and that our jurisdiction is limited to questions of law. If we are satisfied that the Commissioners have misconstrued the Act of Parliament, it may be our duty to send the case back to the Commissioners with a proper direction, or, in some peculiar circumstances, there might be sufficient material before us to make the precise order which in our view the Commissioners ought to have made. Short of this we ought not in any way to question the finding of the Commissioners. It is they who must decide whether the proposed increase is reasonable. In the present case

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they have decided that all the four conditions mentioned in s. 1, sub-s. 1, have been satisfied, and they have, in the language of the section, "treated the increase of rate or charge as justified." In our opinion there was no misdirection on the part of the Commissioners and their decision ought not to be interfered with. In arriving at our conclusion we have not failed to consider the dissentient judgment of Sir James Woodhouse. The appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitors for appellants: *Neish, Howell & Haldane.*
Solicitor for respondents: *R. Hill Dawe.*

G. A. S.

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1916
*April* 10, 18.

## PRODUCE BROKERS COMPANY, LIMITED *v.* OLYMPIA OIL AND CAKE COMPANY, LIMITED.

*Contract—Sale of Goods—Custom of Trade—Reasonableness.*

A trade custom is not reasonable unless it be fair and proper and such as reasonable, honest, and fair-minded men would adopt.

By a custom of the oil seed trade in the case of a contract of resale in the terms of the printed form of the Incorporated Oil Seed Association the buyers impliedly agree with their sellers to accept the original shipper's appropriation if passed on without delay, provided it was valid at the time it was made, even though at the time of being passed on the appropriation might, apart from the custom, be invalid by reason, for example, that the goods had been lost at sea:—

*Held*, that the custom was not unreasonable.

MOTION by the Olympia Oil and Cake Company, Limited, to set aside two awards of arbitrators.

Four grounds were stated in the motion on which it was sought to set aside the awards. When the motion originally came on for argument the second, third, and fourth grounds were alone dealt with, and ultimately it was decided by the House of Lords that the motion ought to be dismissed as regards those three grounds, leaving the first ground of the motion to be disposed of by the Divisional Court. The decision of the House of Lords is reported in [1916] 1 A. C. 314. The facts of the case are fully stated in that report, and

also in a report of a decision of the Divisional Court on a special case stated by the arbitrators : see [1915] 1 K. B. 233.

The first ground of the motion was that each of the awards was bad on its face or wrong in point of law. Shortly stated, the question in the arbitration arose out of a contract contained in a printed form issued by the Incorporated Oil Seed Association, by which the sellers, the Produce Brokers Company, sold to the buyers, the Olympia Oil and Cake Company, 6000 tons of Soya beans. In fulfilment of this contract the sellers on February 4, 1913, declared and appropriated a cargo of beans shipped at Vladivostok on a ship called the *Canterbury* by the East Asiatic Company. This cargo had on February 4 been tendered to and accepted by the sellers under a contract in similar terms by which the East Asiatic Company had sold to them the same quantity of Soya beans. On February 3 the *Canterbury* had in fact met with disaster near Vladivostok, and on February 4 she sank with her cargo. The fact of the loss became known to the sellers on February 4 in the interval between the receipt by them of the tender from the East Asiatic Company and the handing of that tender to the buyers.

The Board of Appeal of the Incorporated Oil Seed Association, by their award dated June 25, 1914, affirmed an award of the umpire, dated May 17, 1913, and found :—

1. That by the long-established and well-recognized custom of the trade in case of resales buyers under this form of contract impliedly agree with their sellers (*a*) that they will accept the original shipper's appropriation if passed on without delay provided that the original shipper's appropriation was valid and in order at the time of being made by the original shipper to his buyer ; and (*b*) that their sellers shall be under no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might apart from such custom and implied agreement be invalid and not in order.

2. That the appropriation in question by the sellers was made under a resale to which the custom applied.

3. That the appropriation of the original shipper, the East Asiatic Company, was valid and in order.

The arbitrators therefore awarded that the buyers were bound to

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accept as a valid appropriation under the contract the copy of the original shipper's appropriation passed on to them by the sellers.

In support of the motion it was contended on behalf of the buyers, inter alia, that the custom was unreasonable and bad in law.

*C. R. Dunlop* (*Leslie Scott, K.C.*, with him), for the buyers.

*Leck, K.C.*, and *F. D. MacKinnon, K.C.*, for the sellers.

[*Wigglesworth* v. *Dallison* (1), *Sweeting* v. *Pearce* (2), *Paxton* v. *Courtnay* (3), *Leuckhart* v. *Cooper* (4), and Halsbury's Laws of England, vol. 10, p. 253, were referred to.]

*Cur. adv. vult.*

April 18. HORRIDGE J. read the following judgment:—The notice of motion in this case asked that two awards dated May 17, 1913, and June 25, 1914, might be set aside upon the four grounds therein stated. Grounds 2, 3, and 4 have now been disposed of by the decision of the House of Lords (5), but the first ground remains to be disposed of. This ground is that each of the awards was bad on its face or wrong in point of law. The points relied upon under this head were as follows: (1.) On the face of the awards there was an incompatibility between the contract and the custom; (2.) the custom was unreasonable; (3.) the custom was not applicable to the contract in question. As regards (1.), as was admitted before us, we had already on the previous hearing decided that the custom was not incompatible with the written contract.

The second question is whether or not the custom was unreasonable. A usage is not reasonable unless it be fair and proper and such as reasonable, honest, and fair-minded men would adopt: *Paxton* v. *Courtnay*. (3) The custom found in this case by the arbitrators was (*a*) that the buyers impliedly agreed with their sellers that they would accept the original shipper's appropriation if passed on without delay provided that the original shipper's appropriation was valid and in order at the time of being made by the original shipper to his buyer; and (*b*) that the sellers should be under no obligation to make any appropriation other than that of passing on a copy of

(1) (1779) 1 Doug. 201; 1 Sm. L.C., 12th ed. 613.
(2) (1861) 9 C. B. (N.S.) 534.
(3) (1860) 2 F. & F. 131.
(4) (1836) 3 Bing. N. C. 99.
(5) [1916] 1 A. C. 314.

original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might apart from such custom and implied agreement be invalid and not in order.

To put the above more shortly, it amounts in my view to saying that when the parcel of goods to be shipped has been resold and a proper appropriation has been made of a particular shipment in the first instance a copy of that appropriation will be accepted by the purchaser under the second contract, even though the goods have at the time of the appropriation been lost. I cannot see why such an agreement cannot be fairly and properly made between reasonable, honest, and fair-minded men. On behalf of the respondents it was said the finding of the arbitrators was conclusive as to the custom being a legal custom, and therefore a reasonable custom, but I think, notwithstanding the finding of the arbitrators, if the custom as set out in the award was in our opinion unreasonable we should have been entitled to say so, as the nature of the custom fully appears from the finding. I have already said I do not think it is unreasonable.

The third ground, that the custom was not applicable, was based on two contentions—(*a*) that the second finding in the award that it appeared the appropriation was made under a resale was wrong on the face of the award; (*b*) that on the face of the award it appeared there was no original shipper's appropriation which was valid and in order, inasmuch as the loss of the parcel took place before the first appropriation was made. It was admitted that in order to establish either of these contentions it was necessary to hold the special case formed part of the award. Whilst not deciding that either of these contentions could in fact be established from the findings of the special case, I base my judgment on my view that the special case formed no portion of the award. The arbitrators merely accept the law as decided by the Divisional Court upon this case, and they in no way incorporate it in the final award. The objection that the award is bad in law on the face of it must be dealt with strictly, and the award is limited to the documents which really form part of it. The motion must be dismissed with costs.

ROWLATT J. I am of the same opinion. We decided on the former occasion that this custom was not contradictory to the

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Rowlatt J.

written contract. The points now raised are that the award is bad on the face of it, first of all because it is wrong in law, this not being, it is said, a resale; secondly, because it is unreasonable; and thirdly, because the original appropriation is said not to have been valid.

The contract in question could not at the time it was made be classified either as an original sale or as a resale. It is a contract for the sale of future goods against which the seller may declare either a cargo which he possesses by reason of having himself shipped it, or a cargo which he may have bought as a cargo from the shipper, or a cargo which he may thereafter ship or buy from a shipper. If at the time of making the contract the seller has a cargo which he has shipped himself, that does not make it an original sale, for he may ultimately tender a cargo which he has bought; nor if when he makes the contract he has a cargo which he has bought does that make it a resale, for he may tender a cargo which he has shipped already or afterwards ships. Mr. Dunlop argued that the contract can only be a resale if at the time of making it the seller has a cargo which he has bought. Supposing a man makes two contracts having at the time both a cargo which he has bought and a cargo which he has shipped, which is the original sale and which is the resale? No answer is possible. It is clear, therefore, that only when the cargo is declared under the contract is it determined whether there is that which the contract calls, not very accurately, a resale. A case of resale arises if the seller declares a cargo which he has not shipped himself but bought, and whether he bought it before or after the contract can make no difference. I do not agree with the contention that in the circumstances of this case there was not a resale. But, further, the point cannot be raised on this motion, for the special case which states the facts is not incorporated in this award.

It is also contended that the custom is unreasonable. I am not prepared to go the length that Mr. Leck contended for and say that, because arbitrators have found a custom, the Court is therefore bound to hold that it is a reasonable one. This contract is a contract which may lead to very curious results, because it enables a man in whose hands the contract is void to elect to keep it alive and to hand it on to somebody in whose hands

it is also void, who may elect to hand it on to somebody else until it reaches the hands of somebody who is not a seller when it is no good and comes to an end. If the persons engaged in this trade like to do that I cannot say it is unreasonable. It seems to me that before the Court can say that a custom, not sought to be introduced against an ignorant purchaser, but known to both parties to the contract, is unreasonable, it has to say the custom outrages justice and common sense. I think it is quite out of the question to suggest this custom is such a custom as that.

The third ground which is raised is that the original tender was not a valid one, and therefore that the tender on what was called the resale could not be valid either under the custom. The short answer to that is that the facts which are necessary to support that contention are only to be found in the special case which is not part of the award.

*Motion dismissed.*

Solicitors for buyers : *William A. Crump & Son, for Andrew M. Jackson & Co., Hull.*

Solicitors for sellers : *Waltons & Co.*

F. O. R.

1916
*May 2.*

## LESTER *v.* HICKLING.

[1915 L. 788.]

*Bill of Sale—Subsequent Agreement—Defeasance—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9.

By s. 10, sub-s. 3, of the Bills of Sale Act, 1878, if a bill of sale is made or given subject to "any defeasance . . . not contained in the body thereof, such defeasance . . . . shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration . . . . otherwise the registration shall be void."

After a bill of sale had been given by the grantor, and as a separate transaction, an agreement was entered into between the grantor and grantee that the grantee would not enforce the bill of sale so long as the grantor continued to perform certain conditions. The bill of sale was registered without the terms of the subsequent agreement being included in it:—

*Held*, that the agreement, not having been made previous to or contemporaneously with the giving of the bill of sale, was not a defeasance within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878; that it was therefore not necessary that the agreement should be included in or written on the same paper or parchment as the bill of sale; and that consequently the bill of sale was good.

ACTION set down for hearing in the short cause list and tried before Scrutton J. without a jury.

The action was brought by the plaintiff Lester for a declaration that a bill of sale granted on April 25, 1912, by the plaintiff to the defendant was void, and for an injunction restraining the defendant, his servants and agents, from taking possession of the chattels comprised in the bill of sale or otherwise enforcing the same.

The plaintiff was a coal hawker who very frequently obtained his coal from the defendant, and shortly before the bill of sale was given by the plaintiff he was in debt to the extent of 186*l.* to the defendant for coal supplied, and the defendant obtained judgment against him for that sum. Negotiations then took place between the plaintiff and defendant with a view to arranging terms for postponing the payment of the amount of the judgment. The defendant asked the plaintiff to sign a bill of sale, but the plaintiff

refused to do so, and thereupon the defendant issued execution under his judgment. Shortly afterwards, on April 25, 1912, an interview took place between the plaintiff and defendant at the defendant's office at which it was agreed that the execution should be withdrawn if a bill of sale comprising certain goods and chattels in the plaintiff's dwelling-house and premises was executed. The bill of sale was then executed, and it provided (inter alia) for payment of the sum of 204*l.* 6*s.*, the amount of the judgment and costs, in two equal payments of 102*l.* 3*s.*, with interest thereon, on July 25 and October 25, 1912, and that in the event of default made by the plaintiff in any of the conditions contained therein, and in any event specified as causes of seizure in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, the defendant might enter upon the premises and seize the goods and remove and sell the same. The learned judge found as a fact that that agreement was a complete transaction, and that nothing at that time was said about any payment by smaller sums.

On the next day, April 26, 1912, and (the learned judge found) as a transaction separate from that which had taken place on the previous day, the plaintiff went to the defendant's premises to obtain some coal, and a discussion then took place between the plaintiff and defendant with regard to the transaction of the previous day, the plaintiff intimating that he would not be able to pay the stipulated amounts within the six months as had been agreed by the terms of the bill of sale, whereupon the defendant said that if he (the plaintiff) would pay by instalments he would not be hard upon him. The plaintiff then said that he would pay 10*s.* a week, and thereupon paid the first 10*s.* The learned judge found that the effect of that conversation was that there was an agreement then entered into between the plaintiff and defendant that the defendant would not enforce the bill of sale so long as the plaintiff continued to pay 10*s.* a week and bought his coal from the defendant.

On or about April 27, 1912, the bill of sale was registered without the terms of the agreement of April 26, 1912, being contained in it. The plaintiff claimed a declaration that the bill of sale was void upon the ground that the agreement of April 26, 1912, amounted to a defeasance of the bill of sale which was not expressed in it, and,

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consequently, that under s. 10, sub-s. 3, of the Bills of Sale Act, 1878 (1), the registration and therefore the bill of sale were void.

*H. C. Bickmore*, for the plaintiff. Even though the agreement to pay by instalments was not contemporaneous with but was subsequent to the giving of the bill of sale, the agreement constituted a defeasance or condition within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and therefore required registration: *Pettit* v. *Lodge & Harper*. (2) The language used by the reporter in his statement of facts and by Cozens-Hardy M.R. in his judgment in that case indicates that the arrangement with regard to the weekly payments was made subsequent to the execution of the bill of sale. *Linfoot* v. *Pockett* (3) is distinguishable. In that case the grantor of the bill of sale never assented to the subsequent terms which the grantee sought to impose upon him a month after the bill of sale had been executed. In the present case the bill of sale is invalid as not being registered in accordance with s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and s. 8 of the Bills of Sale Act (1878) Amendment Act, 1882, and as not being in the form in the schedule to the Act of 1882, as required by s. 9 of that Act. [*Edwards* v. *Marcus* (4) and *Ex parte Southam* (5) were also referred to.]

(1) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 3: "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 8: "Every bill of sale shall be duly . . . . registered under the principal Act within seven clear days after the execution thereof . . . .; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

Sect. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

(2) [1908] 1 K. B. 744.

(3) [1895] 2 Ch. 835.

(4) [1894] 1 Q. B. 587.

(5) (1874) L. R. 17 Eq. 578.

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*C. Doughty*, for the defendant. The language of s. 10, sub-s. 3, of the Bills of Sale Act, 1878, is clear. It means a defeasance or condition existing at the time the bill of sale is made or given, and therefore all the conditions which form the bargain between the parties at the time of the signing of the bill must be expressed in the bill of sale, and if they are the bill is good, and it is the paper or parchment complete in itself which must be registered. If that is done the requirements and formalities of the Acts of 1878 and 1882 are duly complied with, and there is nothing in these or any other statutes prohibiting or penalizing the parties for making a subsequent collateral bargain affecting the carrying out of one of the terms of the contract expressed in the bill of sale. No doubt the Court requires clear proof that the collateral bargain was genuine and bona fide and was made subsequent to the giving of the bill of sale and was not part of a contemporaneous arrangement. [*Hall* v. *Whiteman* (1), *Smith* v. *Whiteman* (2), *Heseltine* v. *Simmons* (3), and *Linfoot* v. *Pockett* (4) were referred to.]

*E. W. Hansell*, as amicus curiae, referred to an article by Mr. Herbert Reed, K.C., in Halsbury's Laws of England, vol. 3, p. 45.

SCRUTTON J., having stated the facts, continued: The question is whether the agreement which I have found was entered into on April 26, 1912, is a defeasance of the bill of sale which renders the registration—and, therefore, the bill of sale—void under s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and in order to answer that question I must first consider the language of the sub-section. [Having read the sub-section, the learned judge continued:] In my view, apart from authority, the sub-section clearly relates to a defeasance or condition existing at the time the bill of sale is made or given—i.e., it means either an antecedent or a contemporaneous agreement, part of the same transaction. I do not see how by the use of language in any ordinary sense it can be said that a bill of sale is made or given subject to a defeasance if the defeasance is agreed upon some time after the bill of sale is made or given. It is curious that there is so little authority upon the subject.

(1) [1912] 1 K. B. 683.
(2) [1909] 2 K. B. 437.
(3) [1892] 2 Q. B. 547.
(4) [1895] 2 Ch. 835.

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There appear to be only three reported cases on Bills of Sale which have any bearing upon the passage in a text-book which have any bearing upon the matter. In *Ex parte Southam* (1), there being an agreement for payment by instalments, Sir James Bacon C.J., in delivering judgment, said: "Mr. Robertson Griffiths said that he did not care whether that agreement was entered into before or after the execution of the bill of sale. In my opinion it makes all the difference whether it was before or after." Sir James Bacon clearly thought—as I do—that a bill of sale is not made or given subject to a defeasance if the defeasance comes into existence after the bill of sale is made or given.

In *Linfoot* v. *Pockett* (2), a decision of the Court of Appeal, after a bill of sale was drawn up the money-lender in whose favour it was granted sent a set of rules and regulations which he relied upon as an agreement and tried to enforce. All three members of the Court of Appeal said that there was no agreement by the grantor of the bill of sale, but simply a receipt by him, without objection, of the regulations. The case is therefore not a direct authority upon the point I have to decide, but all three members of the Court used language which appears to show that they took the view that if there had been an agreement after the bill of sale was executed it would not have been a defeasance within the meaning of sub-s. 3 of s. 10 of the Bills of Sale Act, 1878. Lindley L.J., in giving judgment, said: "Now, was there any condition or defeasance which ought to have been embodied in this bill of sale? It appears to me that when the facts are understood there obviously was not. The bill of sale was executed; and up to that time no condition, no defeasance, was mentioned. When it was executed the bargain was complete, and there was no condition or defeasance forming part of the bargain." That language seems to me to point clearly to the conclusion that Lindley L.J. thought that an agreement entered into after the bargain, and forming no part of it at the time it was made, was not a defeasance within the meaning of the section. Lopes L.J., in giving judgment, said: "Then another point was taken—that the bill of sale was void on the ground that it was subject to a condition or defeasance such as is contemplated by the Act of 1878, s. 10, sub-s. 3. I think that means a condition or

(1) L. R. 17 Eq. 578, 580. (2) [1895] 2 Ch. 835, 844, 848, 850.

defeasance wh or part of the bargain, and here, as far as I can discover, it is impossible to say that there was any condition or defeasance which was part of the bargain." Rigby L.J. said: "A stipulation which was not made known to the other side cannot be a condition within the meaning of the Act, and the putting forward of those rules and regulations after the bill of sale had been executed and the money advanced would not make them part of the contract." All those judges took the view that an agreement, if there was one, after the execution of the bill of sale, and not forming part of the bargain which led to the execution of it, would not be a defeasance within s. 10, sub-s. 3, of the Act of 1878.

There remains the case of *Pettit* v. *Lodge & Harper* (1), which I must frankly acknowledge has given me considerable difficulty, because if the point before me was decided by the Court of Appeal I am bound by that decision. I can find no indication in the statement of the facts in the report or in the judgments that the judges of the Court of Appeal had present to their minds the question of the difference between an agreement made before or contemporaneously with the giving of the bill of sale and a separate agreement entered into afterwards. The reporter has not stated the facts so as to show clearly when the agreement was made, I think for the reason that no consideration was given to the point in the course of the argument. Although the language used by Cozens-Hardy M.R. in his judgment is more consistent with the agreement having been made after the bill of sale was given it is extremely vague. The previous decision in *Linfoot* v. *Pockett* (2) in the Court of Appeal was not cited, and I cannot find in the argument that any question was raised as to the agreement having been entered into before or after the bill of sale was given. I have come to the conclusion that I cannot treat *Pettit* v. *Lodge & Harper* (1) as a decision binding me to hold that an agreement made after the execution of the bill of sale can be treated as a defeasance within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878. I find also that at p. 45 of vol. 3 of the Earl of Halsbury's Laws of England, in an article on bills of sale by Mr. Herbert Reed, K.C., it is stated in plain language that terms made subsequent to the bill of sale are not within the provisions

(1) [1908] 1 K. B. 744. (2) [1895] 2 Ch. 835

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of the section. As, therefore, the agreement in the present case was not part of the bargain for the bill of sale, but was separate from and subsequent to it, I hold as a matter of law that it is not a defeasance subject to which the bill was made or given, and that, consequently, it does not come within the prohibition contained in s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and that therefore the plaintiff's claim fails.

*Judgment for defendant.*

Solicitor for plaintiff: *W. A. H. Johnston.*
Solicitors for defendant: *Jennens & Jennens.*

J. E. A.

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*May* 8, 9.

[IN THE COURT OF APPEAL.]

## MALZY *v.* EICHHOLZ.

[1914 M. 2283.]

*Landlord and Tenant—Injunction—Covenant for Quiet Enjoyment—Nuisance by another Tenant of same Lessor—Mock Auctions—Liability of Common Lessor—Participation—Derogation from Grant.*

A lessor is not liable in damages to his lessee under a covenant for quiet enjoyment for a nuisance caused by another of his lessees because he knows that the latter is causing the nuisance and does not himself take any steps to prevent what is being done. There must be active participation on his part to make him responsible for the nuisance. A common lessor cannot be called upon by one of his tenants to use for the benefit of that tenant all the powers he may have under agreements with other persons.

*Jaeger* v. *Mansions Consolidated* (1903) 87 L. T. 690 followed.

APPEAL from a decision of Darling J. and a special jury.

In 1909 William Eichholz was lessee of a block of buildings known as 161A and 166, Strand, W.C., opposite the church of St. Mary-le-Strand, which comprised a fully-licensed restaurant known as the Colonnade, approached by a corridor, two shops on either side of the corridor, and various offices on upper floors. By a lease of May 20, 1909, Eichholz demised to Amand Malzy the Colonnade together with the licences then or thereafter attached to the premises for keeping them open as a licensed restaurant. The

demise was for a term of twenty-one years from Christmas, 1908, at the yearly rent of 600*l.*, and Malzy thereby covenanted to continue to conduct the business of a restaurant so long as the necessary licences for the retail trade of intoxicating liquors could be obtained. Eichholz covenanted that Malzy paying the rent and performing the covenants might occupy the premises during the term without any interruption or disturbance by Eichholz or any person or persons claiming from, through, or under him. The lease of the restaurant contained a covenant that when the tailor's shop between the restaurant and the Strand became vacant Eichholz would block up the entrance to it through the corridor which led to the restaurant and make another entrance direct from the Strand so that the corridor would be in the exclusive use of the restaurant. Under his head lease Eichholz had to get his landlords' consent to new tenants and to building alterations, and this was obtained and the alterations made. On March 11, 1913, Eichholz let to J. L. Castiglione the tailor's shop for the purpose of carrying on the business of "a dealer in fine arts with power to sell by auction diamonds, jewellery, plate and Japanese curios"; and Castiglione covenanted not to permit or suffer to be done any act which might be an annoyance or disturbance of the superior lessors, the lessor or his tenants, and not to assign or underlet without the consent of the lessor. In July, 1913, he gave a licence to one Dent to carry on mock auctions in the shop for his own benefit. Eichholz was not asked for his permission, as it was alleged that this was not an underletting, but a mere licence. Dent carried on these auctions in such a way as to be a public nuisance and call for the interference of the police. Eichholz frequently wrote to Castiglione to remonstrate, but took no active steps, and was told that the Dents were going away. Malzy alleged that his business was seriously interfered with and damaged by crowds and disturbances thereby occasioned, and he brought this action against Eichholz and Castiglione for an injunction and damages.

By the head lease Eichholz covenanted not to permit any public or private sale by auction upon the premises or any part thereof, or any noisy or offensive business, without the previous written consent of the landlords, or do anything which might prejudice the renewal of the licences or become a nuisance at common law.

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At the trial Darling J. left these questions to the jury, who answered them as follows :—

" 1. Was the business at 161A, Strand so conducted as to be a nuisance and annoyance to the plaintiff and a prejudice to his business of a restaurant keeper at the Colonnade ? "—" Yes."

" 2. Was such business conducted in that manner by the defendant Castiglione or with his authority ? "—" Yes."

" 3. Was the business so conducted with the knowledge and assent of the defendant Eichholz ? "—" Yes."

" 4. Did the defendant Eichholz take all reasonable steps and make all reasonable efforts short of legal proceedings to stop such nuisance and annoyance and prejudice ? "—" No."

" 5. What damages has the plaintiff sustained ? "—" 250*l*."

The question was then argued whether the defendant Eichholz was liable on these findings.

Darling J. came to the conclusion that the terms of the lease granted by the defendant Eichholz to the plaintiff and the obligation of the plaintiff to use the demised premises as a restaurant created an implied obligation upon the defendant Eichholz not to derogate from his own grant, and that on the findings of the jury he had done so. He therefore entered judgment for 250*l*. against both defendants.

Eichholz appealed.

*McCall, K.C.*, and *A. L. Morris*, for the appellant. No liability attaches to Eichholz for anything which has happened. A landlord has never been held liable except for something done by him or by his authority. It is therefore clear that Eichholz is not liable under the express covenant for quiet enjoyment in the lease to Malzy. The presence of that covenant makes it impossible to imply from the tenant's covenant to carry on the business a covenant by the landlord that the tenant shall not be disturbed : *Line* v. *Stephenson* (1) ; *Stephens* v. *Junior Army and Navy Stores*. (2) Eichholz is not liable, for he was not personally concerned in the disturbance : *Sanderson* v. *Berwick-on-Tweed Corporation*. (3) In order to make a landlord liable it must be shown that he has authorized the doing of the acts complained of—*Harrison, Ainslie & Co.* v. *Lord*

(1) (1838) 4 Bing. N. C. 678 ; 5 Bing. N. C. 183.

(2) [1914] 2 Ch. 516, 526.

(3) (1884) 13 Q. B. D. 547, 550.

*Muncaster* (1)—and that he has participated in those acts : *Jaeger* v. *Mansions Consolidated.* (2) The lease to Castiglione cannot be said to have caused the nuisance : *Pwllbach Colliery Co.* v. *Woodman.* (3) Eichholz is not responsible for what was done under that lease : *Saxby* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (4) The fact that he continued to accept the rent did not make him a participator. He could not have been called upon to bring an action against the Dents or against Castiglione. This is said to have been a derogation from his grant, but the same reasoning applies to that. There is no evidence that these houses formed part of what could be called a building estate affected by mutual covenants.

*Arthur Powell, K.C.*, and *T. E. Haydon,* for the respondent. There has clearly been a nuisance for which we ought to have a remedy : *Barber* v. *Penley* (5) ; *Lyons, Sons & Co.* v. *Gulliver.* (6) The appellant put it in the power of Castiglione to give a licence to the Dents to create the nuisance, and he is therefore liable to be made a defendant to a suit to restrain the nuisance : *White* v. *Jameson* (7) ; *Winter* v. *Baker* (8) ; *Cohen* v. *Tannar.* (9) Eichholz continued to take rent from Castiglione, and that shows that he authorized the manner in which the latter dealt with his shop ; it is also evidence that there was a general scheme for the use of the building : *Jaeger* v. *Mansions Consolidated* (2) ; *Hudson* v. *Cripps.* (10) These mock auctions were a breach of the covenant for quiet enjoyment : *Jenkins* v. *Jackson.* (11)

There was also an implied obligation on the part of Eichholz not to derogate from his grant by using the rest of the building so as to interfere with Malzy's comfort : *Grosvenor Hotel Co.* v. *Hamilton* (12) ; *Aldin* v. *Latimer Clark, Muirhead & Co.* (13) Liability under the covenant is not confined to title and possession : *Jones* v. *Consolidated Anthracite Collieries* (14) ; *Sanderson* v. *Berwick-on-Tweed Corporation.* (15)

(1) [1891] 2 Q. B. 680, 684.
(2) 87 L. T. 690.
(3) [1915] A. C. 634, 639.
(4) (1869) L. R. 4 C. P. 198.
(5) [1893] 2 Ch. 447.
(6) [1914] 1 Ch. 631.
(7) (1874) L. R. 18 Eq. 303.
(8) (1887) 3 Times L. R. 569.
(9) [1900] 2 Q. B. 609.
(10) [1896] 1 Ch. 265.
(11) (1888) 40 Ch. D. 71.
(12) [1894] 2 Q. B. 836.
(13) [1894] 2 Ch. 437.
(14) [1916] 1 K. B. 123.
(15) 13 Q. B. D. 547.

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Again, Eichholz was in the position of a trustee, and was bound to act for the benefit of his tenants and not let them interfere with each other. Altering the front of the shop was one of the acts which enabled the auctions to be carried out. The jury found that the acts were done with his knowledge and assent, so that brings him within *Jaeger* v. *Mansions Consolidated.* (1) The jury found that Eichholz consented to the doings of the Dents with knowledge of what they were. It is not contended that he was called upon to take active proceedings against the Dents to stop the nuisance: *Hall* v. *Ewin* (2); *Powell* v. *Hemsley.* (3)

No reply was called for.

LORD COZENS-HARDY M.R. stated the facts shortly and continued: I do not think there is really much in that alteration of the shop front that is relevant to what we have to decide to-day. The alteration which was made was approved of by the lessors' surveyor, the work was done under his supervision, and the superior landlords have from that day to this in no way interfered. It seems idle to contend that that was such a breach of the conditions of the lease as might have imperilled the existence of the lease under Mr. Eichholz's title and, therefore, the title of all the sub-lessees. Matters went on fairly right at first. The shop window in front was taken out in this sense, that not the whole of the width was taken out, which was about 12 feet, but about 9 feet. Some glass was left on each side, and it was used, as it was intended to be used, for the purpose of an auction room, which was to be a closed auction room and not an auction room in any way open to the street. It was used as an auction room. It is said that that imposed some obligation upon Mr. Eichholz because an auction room is a business which is very apt to be carried on in such a way as to create a public nuisance possibly as well as a private nuisance. In the present case it undoubtedly did create such a nuisance. Somebody named Dent got into possession under some arrangement with Castiglione, and they ultimately pulled out the whole width of the window—by which I mean the few feet of glass on each side of the original opening—and they carried on what

(1) 87 L. T. 690. (2) (1887) 37 Ch. D. 74.
(3) [1909] 2 Ch. 252.

in effect was the business of a mock auction. The police interfered owing to scenes of great disorder, and the Dents were ultimately convicted. They or one of them were or was convicted and sentenced after a trial to a term of imprisonment. While this was going on there was all this noise and disorder. Mr. Malzy, the plaintiff, complained that his business of a restaurant keeper was interfered with, that it was a nuisance and most prejudicial to his business, and that he was entitled to damages in respect of it. The matter came before the learned judge, who dealt with the questions very carefully in his summing-up. He put certain questions which the jury have answered. The first one was: "Was the business at 161A, Strand so conducted as to be a nuisance and an annoyance to the plaintiff and prejudicial to his business of a restaurant keeper at the Colonnade?"—A. "Yes." There is no question raised before us but that that was perfectly right. Then: "Was such business conducted in that manner by the defendant Castiglione or with his authority?"—A. "Yes." Castiglione does not appeal against the judgment on the present occasion, and there is no reason to suppose that it was otherwise than perfectly right. Now comes the next question: "Was such business so conducted with the knowledge and assent of the defendant Eichholz?"—A. "Yes." I shall deal with that point more carefully a little later. Then the next question is: "Did the defendant Eichholz take all reasonable steps and make all reasonable efforts short of legal proceedings to stop such nuisance, annoyance, and prejudice?"—A. "No." And then the damages were assessed at 250*l.* and judgment was entered for 250*l.* with costs against each of the two defendants. We have heard a very able and elaborate argument from the plaintiff's counsel supporting the case against the defendant Eichholz on various grounds. The first point raised is that there was an express covenant for quiet enjoyment in the usual form in the lease to Mr. Malzy, the plaintiff, and that that has been broken by Mr. Eichholz, who has done acts which fairly amount to or which the jury were entitled to say were done with his knowledge and consent. Then it is said, even if it is not within the express covenant, there was an implied covenant for quiet enjoyment. I pass that by at once by saying that when in a deed you find an express covenant dealing with a particular matter as to the demised premises there

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is no room for an implied covenant covering the same ground or any part of it. That is very old law. An expression of doubt upon that would be a fatal thing to the whole law of covenants both express and implied. The very object of inserting a covenant for quiet enjoyment in a conveyance of freehold or leasehold property is to get rid of the implied covenant which is found in the word "grant" or "demise," whichever it may be. Then it is said that if the express covenant does not go far enough you can fall back upon the implied covenant from the word "grant" or the word "demise." That proposition would be absolutely contrary to the uniform practice of all owners who deal with real property, and would, moreover, be contrary to the law which has been perfectly established for more than half a century. I need not cite authority for that proposition. Then it is said there was a derogation from the grant. Now what is the derogation? It seems to me to be nothing more or less than a statement of the same proposition, that there is a breach of the covenant for quiet enjoyment. Our attention has been called to the case of *Grosvenor Hotel Co.* v. *Hamilton.* (1) That was a perfectly different and a perfectly clear case, if I may respectfully say so. There there was a covenant for quiet enjoyment. The lessor, not on the demised premises but on adjacent premises, caused a nuisance by working engines. That was not, of course, within the covenant for quiet enjoyment, because the covenant for quiet enjoyment extended to different matters. The fact that what he was doing on adjoining land derogated from his express grant was a matter which most legitimately and properly came into play, but was in no way intended, nor could it be deemed, to affect the general law as to a covenant for quiet enjoyment. Then there is another point which was taken, and that was the neglect of Mr. Eichholz to prevent the nuisance. The learned judge in the course of the case held that there was no breach of the covenant for quiet enjoyment; he ruled also that there was no evidence that Mr. Eichholz had participated in any nuisance; but, notwithstanding those rulings, after hearing the evidence he put to the jury the questions which I have read. The only point which seems to me to create any difficulty in this case is what must a landlord not do if he wants to escape liability in respect of a nuisance really commenced

(1) [1894] 2 Q. B. 836.

by somebody else. I do not think that as a proposition of law the matter can be more accurately stated than in the case relied upon by counsel for the respondent, *Jaeger* v. *Mansions Consolidated.* (1) Mention is there made of an unreported case of *Harris* v. *Bentley*, in which Lord Collins, then the Master of the Rolls, said this : " If the evidence showed acquiescence by the landlord carried to such a point as to found an inference that the landlord actively participated in the use of the flats for immoral purposes, possibly there might be a breach of the contract." The question in that case was under what circumstances the landlord might possibly be made liable for the use by one of his tenants of the flats for immoral purposes, and Lord Collins there laid down that there must be such circumstances as to found an inference that the landlord actively participated in the use of the flats for immoral purposes. The same doctrine is laid down in the judgment of the same case. I apprehend there is no authority and no principle for holding a landlord liable under a covenant for quiet enjoyment—that is to say, that he has done anything which renders him liable to damages under the covenant in respect of quiet enjoyment—merely because he knows of what is being done and does not take any steps to prevent what is being done. There must be something much more than that. There must be something which can fairly amount to his doing the act complained of or allowing the act complained of, either by actual participation by himself or his agents, or by what Lord Collins called active participation in that which was complained of. Then it is said, Just look at a number of things Mr. Eichholz did. In the first place he had no business to take out the window at all and lay the shop open to the street. Even if that were so, I do not think as between Mr. Eichholz and his superior landlord that would in any way avail the present plaintiff, Mr. Malzy. Then it was said, This auction room was such a risky business, almost notoriously one involving great noise, that he ought not to have allowed it, and ought not to have allowed it for the purpose of an auction room. It is quite a novel doctrine to me that permission by a lessee to use demised premises for a purpose which may or may not involve or create a nuisance is a wrong act on the part of the landlord, and that the landlord can be rendered liable merely because a person

(1) 87 L. T. 690, 694.

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does carry on that business in such a manner as to create a nuisance. It would be different, of course, if it were let for a purpose which necessarily involved a nuisance, but this letting did not necessarily involve a nuisance. That is quite plain from the plaintiff's own evidence. He says there was no ground for complaint until the Dents came into possession. Then it is said, Oh, but you knew of it and you have been receiving the rent from Castiglione, which he could not have paid unless he got it from the Dents, and therefore you knew the business was being carried on, and that would amount to consent or assent—it is put both ways—to what was done, and rendered you, Eichholz, an active participator in the nuisance which was being carried on. That proposition, to my mind, has only to be stated to show how fallacious it is. It cannot be that a landlord who according to the settled authorities is not bound to commence any legal proceedings to abate a nuisance is in this position, that unless he does commence those proceedings he cannot recover any rent, or if he does receive the rent he is to be taken to have sanctioned everything that the wrong-doer has done. Then, putting it another way, it is said, In your lease to Castiglione you had power, whenever anything was done or was threatened to be done which might have imperilled the existence of your own lease, to enter upon the premises and abate what was objectionable and do what was necessary to secure your title. That again seems to me an extraordinary proposition, but if it be true it is a proposition which renders Mr. Eichholz a sort of trustee of that covenant for the benefit of Mr. Malzy. In my opinion that cannot be sustained. Then what is to be said to the answer to the third question: "Was the business so conducted with the knowledge and assent of the defendant Eichholz?"—A. "Yes." I think there is no evidence whatever that it was done with the assent of Mr. Eichholz. The correspondence which we have shows from first to last he was complaining of it and was telling Castiglione that he ought to put a stop to it. In my view assent and knowledge are not sufficient unless you qualify it in a manner in which the learned judge has not done here as being essential to create a liability on the part of the defendant. The learned judge in his summing-up seems certainly to intimate to the jury that in considering whether this was done by the authority or with the knowledge or assent of Mr. Eichholz they

must consider what he could have done. That is not the way to test it. He was no more bound to enter into the premises under his power, or to enter without any such power and put the shutters up in the front of the shop, than he was bound to commence an action. That, to my mind, is the only point of difficulty in the case. The learned judge said, and obviously thought, it was a case of great difficulty, and he almost invited an appeal. Notwithstanding the very able and elaborate arguments which we have heard, I think the appeal must be allowed and judgment entered for the defendant Eichholz with costs.

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PICKFORD L.J. referred to the facts and proceeded: I do not think the relations between the superior landlord and the defendant have anything to do with the rights between the plaintiff and defendant. When the alteration to the shop front was made Castiglione took possession of the shop and carried on business there for a few months. He did not make it pay, and as he could not make it pay he either let the premises or gave a licence to carry on business on the premises—I do not think it matters for this purpose which—to some people of the name of Dent. Now the Dents were described by the learned judge in the Court below in this way, and I do not know that it is inaccurate: "The Dents, to put it mildly, were a gang of fraudulent criminals, and having got these premises they proceeded to carry on upon them mock auctions." A good many of the gang, if I may call them so without offence, were convicted and went to prison. I do not know whether that happened to the Dents themselves; I believe it did to one of them. Whether they are there now or not I do not know, and it does not matter. The result of their carrying on these mock auctions was a great annoyance to the plaintiff and a great disturbance in the streets and about the premises, and, according to the finding of the jury, it was an injury to the plaintiff's business. The plaintiff and the Car Insurance Company, who were the tenants of the upper part of the premises, complained. They complained both to Castiglione and to the appellant. The appellant did write from time to time to Castiglione to try and get the nuisance put an end to. Whether he could have done more or whether, speaking not legally but morally, he ought to have done more is a matter upon which I do not express any opinion. Certainly the nuisance went

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on for a long time without his taking any active steps to put an end to it. He certainly remonstrated with Castiglione, and Castiglione, who does not appear to have been altogether strictly accurate in his statements, told him on several occasions that these people, the Dents, had gone or were going. That was not true; they had not gone, and I do not think Castiglione had any assurance that they were going. Castiglione also told him that the Dents were no longer in charge of the business, but that he was selling there on commission as their agent and therefore he could see how the business was being carried on. That was not true. That is what the defendant was told, and so the business of these fraudulent people, the Dents, went on with its attendant annoyance and injury to the plaintiff.

Now the question which arises is, Is the defendant responsible for that? The plaintiff has got a verdict against Castiglione, and Castiglione does not appeal, and therefore, for what it is worth, the plaintiff retains that verdict. The defendant Mr. Eichholz does appeal, and what he says is that he is not legally responsible, whether he ought as a matter of common sense and morality to have taken steps to put an end to this nuisance or not. That is the question we have to decide. Now the first question which lies at the threshold of the case is this: Was this done by the defendant's authority? I do not think it is enough to say that it was done with his knowledge or consent, and I think in the very able argument of Mr. Haydon the word "consent" or "assent" was used sometimes in rather an ambiguous sense. I think what has to be proved is stated in the passage which has been read by the Master of the Rolls quoting the judgment of the then Master of the Rolls, Lord Collins, and also in this passage, in which the learned judge says in *Jaeger* v. *Mansions Consolidated* (1): "The allegation is that some of the adjoining flats have, as I have said, been occupied for immoral purposes. Of course that would not in itself be enough to ground proceedings against the landlord, and it has been very properly admitted by the plaintiff's counsel in this case that unless they can adduce evidence from which a jury might fairly infer that the acts of the persons using these flats for immoral purposes can be construed to be the acts of the defendants in the sense that they authorised them—not

(1) 87 L. T. 696.

merely that they did not stop them, but that they were in effect a party to them—they cannot pray against them, as giving a cause of action, the fact that these premises are conducted and used for immoral purposes." Now that, of course, is a statement of the law by which we are bound, and, if I may say so without disrespect, in my opinion it is an absolutely correct statement of the law, and therefore, unless the consent or knowledge amounts to making the defendant in effect a party to the acts, it is not sufficient to make him liable. The sheet-anchor of the plaintiff is, if I may say so, the finding of the jury to this effect: "Was such business so conducted with the knowledge and assent of the defendant Eichholz?—A. Yes." Now the first thing we have to look at is what was that conduct of the business with which the jury were dealing. As to that it seems to me there is no doubt. It was the conduct of the business by the fraudulent people, the Dents. The evidence not only of the plaintiff himself, but of all his witnesses, is that until the Dents took possession there was no nuisance and no disturbance at all. It was suggested that the authority given to Castiglione to conduct auctions upon the premises, coupled with the taking away of the whole of the front of the shop so as to make the auctions take place in an open space, was of itself sufficient authority for what took place. In my opinion that is not so. Authority to conduct a business is not an authority so to conduct it as to create a nuisance unless the business cannot be conducted without a nuisance. That was decided only the other day in the House of Lords in *Pwllbach Colliery Co.* v. *Woodman* (1), and it is perfectly clear that you may conduct an auction, even in an open shop, without a nuisance. We need not travel outside the four corners of this case to find that out, because we have evidence from all the witnesses that it was so carried on until the Dents took possession and began to carry on these mock auctions. That was the conduct of the business to which the jury were referring when they found that it was done with the knowledge and assent of the defendant Eichholz. The learned judge ruled, and in my opinion properly ruled, at the end of the plaintiff's case that there was no evidence that he participated in the nuisance. He says: "There is no evidence that he, the defendant, participated in the nuisance. The evidence is that he

(1) [1915] A. C. 634.

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disapproved of it. I do not think it made him a participator simply because he has not put in force an implied covenant, if ever there is such a thing." That, in my opinion, was right. I do not think there was any evidence that he assented to it in such a way as to authorize or become a participator in the act in the sense in which the words ought to be used according to the judgment of Lord Collins in the case to which I have referred. But the learned judge did leave this question to the jury and they answered it against the defendant, and it is upon the answer to this question that so much stress has been laid: "Was such business so conducted with the knowledge and assent of the defendant Eichholz?" The jury found it was, but when I look at the summing-up I do not think the learned judge had any intention of departing from his ruling that there was no evidence that the defendant was a participator in it, because I find that the whole thing which he put to the jury as being evidence to show that it was done with his knowledge and assent was that he did not stop it. The learned judge said to the jury: "The case is put in this way: 'You had power to enter upon these premises and put this shop front back; it is quite true if you had done so the Dents would have knocked it down again; but you could have gone in under your power.'" The learned judge left that to the jury as evidence of knowledge and assent, and the jury found knowledge and assent upon that. If that finding is to be taken as meaning knowledge and assent such as to make the acts acts authorized by the defendant and the defendant a participator in them, in my opinion there was no evidence to support it. If it means, and I believe it only does mean, that it was done by his knowledge and assent—certainly with his knowledge and by his assent, because he did not take any steps to stop it—then that is not sufficient to satisfy the requirements of the passage in that judgment of Lord Collins which I have read. It was said, first, that authorizing auctions at all was sufficient to make the defendant responsible for this nuisance. I have pointed out that in my opinion that is not so. Then it is said he knew it, and although he remonstrated he did not mean it, but meant them to go on all the time, and although Castiglione said he was going to stop it the defendant knew quite well that he was not, and that the defendant knew quite well that he could not get his money from Castiglione unless these mock auctions did go

on. All I can say is those are only suggestions. I cannot find that there is any evidence of them. It is quite true that the defendant did receive his rent. He received his rent from Castiglione, and he received his rent from Castiglione at the same time that Castiglione was assuring him that this nuisance was going to be put a stop to. I cannot see that that is evidence that he was authorizing the nuisance to be carried on. I think that some of this argument proceeds upon this, that Mr. Eichholz's conduct was very suspicious, and the jury may have doubted his bona fides, and therefore they were justified in finding against him. Now that is an argument which is sometimes used, but I think it is necessary to point out that the fact that there is reason to disbelieve what a witness says does not make evidence against him. Here he said nothing in the witness-box. He only said it upon paper. If there is evidence against a man, the fact that he is not called, or you do not believe him if he is called, may be a reason for accepting that evidence even though slight, but it does not make evidence, and in this case, in my opinion, there was no evidence. I do not think the receipt of the rent under those circumstances was evidence, and I do not think that the omission to take steps to stop what was going on, not by his assent, but by the act of somebody admitted by his assent, was sufficient to show that he was a participator in the sense which I have explained. If that be so, then it seems to me there was no breach of the covenant for quiet enjoyment. He did nothing, and nothing was done by anybody claiming to do the act by his authority, contrary to the covenant for quiet enjoyment. I need not say anything more on this subject, that where you have an express covenant for quiet enjoyment you cannot have an implied one. It is also put in another way. It is said there arises from the relationship of these parties an implied obligation on the part of the defendant to do whatever he could do short of bringing an action to prevent any disturbance of the business carried on by the plaintiff. That argument is based upon this, that there is in the lease to the plaintiff, as I have already said, a covenant by the plaintiff that he will carry on this business as a restaurant. From that there arises, it is said, an implied obligation on the lessor not only not to interfere with the carrying on of the business as a restaurant by the plaintiff himself, but not wilfully to permit or suffer

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anything which would prejudice the tenant in the fulfilment of his obligations. I fail to grasp the exact meaning of "wilfully permit or suffer." If it means a deliberate act to authorize what is done, then I think there is such an obligation in all probability; but if the word "wilfully" is discarded, as I think it must be, and it merely means "permit or suffer," then I cannot see that any such obligation is involved. It does not seem to me that it imposes an obligation upon the defendant to use all the powers that he may have under any agreements with other persons for the benefit of the plaintiff. That is what it would amount to in this case. The right of compelling him to bring an action is repudiated—that is not contended; but it is said that as he had a right to enter upon Castiglione's premises in order to repair anything which might be a breach of the agreement with his head landlord, and as the opening of the whole of the front of the shop was such a breach, it was obligatory upon him to do so, and the plaintiff could compel him to bring an action against him if he did not, or to enter upon these premises and put up the front of the shop again. I do not think that any such obligation can be implied from the mere covenant which he exacted from the plaintiff to carry on the business as a restaurant.

Then another argument was founded upon another finding of the jury, that the defendant did not do all that was reasonable to put an end to the nuisance. What the jury found was this, that it was reasonable for him, and he might reasonably be expected, to have gone in and put up this shop front, and I suppose, according to the learned judge's summing-up, put it up over and over again as soon as the Dents knocked it down. Apparently the Dents were quite capable of knocking it down as often as it was put up. I should doubt whether that finding could stand upon the evidence. I should doubt whether that was a reasonable thing to require of him; but, assuming the finding to stand, it is quite clear it cannot impose any liability upon the defendant unless he was under an obligation to use reasonable care; and in my opinion, there being no breach of the covenant for quiet enjoyment, the covenant for quiet enjoyment not imposing upon him an obligation to use such reasonable care and the suggested implied obligation not imposing upon him such an obligation either, that finding, even if it stands, does not impose a liability upon him.

There was one other ground put forward upon which the liability was alleged to exist. It was this : It is said that what the defendant did was a derogation from his own grant. I ventured to say during the argument, and I think so still, that that involves very much—I do not say entirely—the same question as the other, because it involves what the grant is. If the grant imposes an obligation to see that a disturbance does not take place and to put an end to it if it exists, then it is a derogation from the grant not to do so ; but if the grant does not impose any such obligation at all, then it is not a derogation from the grant not to do it ; and on the same grounds that I think there was not an implied obligation I think there is no such obligation imposed by the grant, and therefore I think that ground fails also.

With regard to the question of there being a scheme, I cannot see that there was anything in the nature of what is usually called in these cases a scheme existing in this case. Therefore I think that the plaintiff's case as against the appealing defendant fails and that judgment ought to be entered for him. The judgment against Castiglione of course will stand. There was no appeal against that.

NEVILLE J. I am of the same opinion. It appears to me that the plaintiff could only succeed on one of two grounds, either on the ground that the defendant committed a breach of the express covenant for quiet enjoyment contained in the lease, or that what he had done amounted to a derogation from his grant. I think in either case authorization or participation in the act done by the defendant was essential to render him liable. It appears to me that knowledge and assent by no means necessarily amounts to authorization. If the finding of the jury was intended to indicate authorization—I mean the finding with regard to knowledge and assent of the defendant Eichholz—then I think that verdict had no evidence upon which it could be supported, and, consequently, I think the plaintiff's case fails on both of those grounds. I ought to say that there was clearly no authorization by the defendant Eichholz in his lease to Castiglione of the nuisance that was committed, nor do I think that there was any evidence of authorization proved. Now the next point made is this : It is said that inasmuch as there was a covenant on the part of the lessee to carry on the business of a

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restaurant keeper, that involved by implication some reciprocal covenant on the part of the lessor. I need not consider what the terms of the covenant were supposed to be, because in my opinion no such covenant can be implied. I think that such a suggestion is entirely novel, and I think it would be extremely unfortunate if the Courts were to recognize any such implication against the covenantor. One word about the receipt of the rent. It has been suggested that in some way the receipt of rent amounted to an act on the part of the defendant Eichholz which rendered him liable to the plaintiff in respect of the nuisance that existed. I think obviously the receipt of rent could only be material in case it was the duty of the defendant Eichholz to bring an action against his lessee, Castiglione, to eject him, because the only effect of the receipt of rent in this regard would be that it would be a waiver, or might be a waiver, of past infringements of the covenant, and, therefore, Eichholz might have lost an existing right to sue Castiglione in ejectment, but the moment you come to the conclusion I have come to, that there was no obligation whatever on the part of the defendant to sue, it is quite clear that the abandonment of the right to sue could not be material to the matter which we have to consider.

Then one other point was made. It was said there was an obligation on the part of Eichholz to sue because he was said to be a trustee for his lessee. Now the general proposition that a lessor is a trustee for his lessee of the provisions in a lease by him to an adjoining tenant is obviously not in accordance with the law. As a general proposition it cannot, I think, for one moment be supported, and I see no special circumstances in the present case to in any way support the contention that here the circumstances involved a trusteeship on the part of the defendant. It appears to me the plaintiff as against the defendant Eichholz has wholly failed and judgment ought to be entered for the latter.

*Appeal allowed.*

Solicitor for appellant: *John Hands.*

Solicitors for respondent: *Baddeleys & Co.*

H. C. R.

## CESCINSKY *v.* GEORGE ROUTLEDGE & SONS, LIMITED.

[1915 C. 3065.]

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*May* 3, 4, 5; *June* 6.

*Copyright—Joint Owners—Infringement by one Co-owner—Injunction —Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-s.* 1.

The plaintiff was the author of a book published by the defendants under an agreement which provided that the copyright in the book should be vested in the plaintiff and the defendants equally. The defendants subsequently, without the consent of the plaintiff, published another book, which was an infringement of the copyright in the plaintiff's book:—

*Held*, that notwithstanding that the defendants were part owners of the copyright in the plaintiff's book, the plaintiff was entitled to an injunction to restrain the defendants from infringing that copyright.

ACTION tried by Rowlatt J. without a jury.

The plaintiff was the author of a work in three volumes, called "English Furniture of the Eighteenth Century," and part author of a fourth volume, called "English Domestic Clocks." The first-named book was published in 1912 by the defendants under an agreement by the defendants with the plaintiff which provided that the defendants should pay the plaintiff a royalty on the sale of each volume and that the copyright should be vested in the plaintiff and the defendants equally. The material parts of the agreement are set out in the judgment. The second book was published by the defendants in 1913, under an agreement by which the plaintiff was to be paid a royalty and the copyright was vested in the defendants subject to a lien thereon for any sums due to the plaintiff for royalties. In 1915 the defendants published a book by one Burgess called "Antique Furniture." The plaintiff alleged that this book was an infringement of the copyright of his two books, and that the value of the royalties and copyrights of the plaintiff's books had thereby been injured. The plaintiff contended also that it was an implied term of the agreements that the defendants should do nothing to injure or diminish the value of the royalties and copyrights. The plaintiff claimed an injunction and damages.

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*Kerly, K.C.*, and *Hugh Fraser*, for the plaintiff. One co-owner of copyright in a book cannot reproduce the work without the consent of the other co-owner; if he does so, it is an infringement of the copyright just as much as if the act were done by a stranger. In *Powell* v. *Head* (1) it was decided that a part owner of dramatic copyright cannot license a representation without the consent of the other owners. The Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), by s. 2, sub-s. 1, provides that copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to do which is conferred on the owner, that is, the sole right to reproduce the work (s. 1, sub-s. 2). The "owner" includes co-owners, and therefore one co-owner cannot reproduce without the consent of all any more than a stranger can.

Under these agreements there is an implied obligation upon the defendants not to do anything to injure the plaintiff's prospects of earning royalties, or to injure the copyright; one contracting party is under an implied obligation not to do anything to prevent the other party from having the benefit of the contract and will be liable in damages for breach of that obligation: *Inchbald* v. *Western Neilgherry Coffee Co.* (2); *Ogdens, Ld.* v. *Nelson* (3); *Warne* v. *Routledge.* (4) The publication of a competing book founded upon the plaintiff's book which must inevitably injure the sale of the plaintiff's work is a breach of this implied obligation.

*Hawke, K.C.*, and *R. L. Ramsbotham* (for *Macgillivray*, serving with His Majesty's Forces), for the defendants. There is no authority for the proposition that one co-owner of the copyright in a literary work can sue the other co-owner for infringement of the copyright. Co-ownership does not imply a user in common; one co-owner may use the joint property independently of the other, though the user is for the benefit of both: *Lauri* v. *Renad.* (5) The implied obligation which the plaintiff seeks to read into these agreements would prevent the defendants from publishing any book dealing with the same subject-matter as that of the plaintiff's books. To imply such a term as that would be to make a new

(1) (1879) 12 Ch. D. 686.
(2) (1864) 17 C. B. (N.S.) 733.
(3) [1904] 2 K. B. 410, 418.
(4) (1874) L. R. 18 Eq. 497.
(5) [1892] 3 Ch. 402.

and different contract between the parties. The only terms which can be implied in a contract are those which are necessarily required to carry out the express terms of the contract: *The Moorcock.* (1) It is said that the defendants must not publish any book which competes with the plaintiff's work and diminishes its sale, but all competition necessarily diminishes the sale. The defendants were bound to act with reasonable skill as publishers, and if they failed to do so they would be liable in damages, but there is no evidence that the plaintiff has suffered any damage from the publication of "Antique Furniture." [*Nichols* v. *Amalgamated Press* (2) was referred to.]

*Kerly, K.C.*, in reply. The plaintiff's contention is, not that the defendants may not publish a competing book, but that they had no right to use the plaintiff's work for the purpose of producing the competing book. With regard to the co-ownership of the copyright in the plaintiff's first three volumes, the agreement between the parties is one for a joint adventure, and the copyright is vested in both parties so as to make them trustees for the purposes of the joint undertaking, and the copyright must not be used for any other purpose than the co-adventure. As to the fourth volume, the copyright, though vested in the defendants, is subject to the plaintiff's lien for royalties. The owner of property subject to a lien has no right to destroy the property. Infringement of copyright is an act affecting the property in the copyright: *Warne* v. *Routledge.* (3) An action for infringement of copyright will lie though no actual damage is proved: *Weatherby & Sons* v. *International Horse Agency and Exchange.* (4) [He also referred to *Morris* v. *Wright.* (5)]

*Cur. adv. vult.*

June 6. ROWLATT J. The plaintiff is the author of an elaborate work called "English Furniture of the Eighteenth Century" in three volumes, and joint author of a fourth volume entitled "English Domestic Clocks." The first three volumes were originally intended to be published by a firm of Sadler & Co., but

(1) (1889) 14 P. D. 64.
(2) (1908) Macgillivray's Copyright Cases, p. 166.
(3) L. R. 18 Eq. 497.
(4) [1910] 2 Ch. 297.
(5) (1870) L. R. 5 Ch. 279.

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an arrangement was made with the defendants to take over the publication. That arrangement was embodied in a written memorandum of agreement dated April 3, 1911, by which it was agreed that the defendants should take over from Sadler & Co. all the stock and property together with the rights of publication of the book, and should continue the publication of the same, subject to certain terms and conditions. The second condition was that the defendants should " print or cause to be printed a first complete edition making the existing stock up to five thousand copies of each part. Subject to the royalty as hereinafter specified to be paid to the author they shall be free from all control in the selling of the book and shall be at liberty to increase the revenue by the inclusion of advertisements in the parts without any further claim on the part of the author." Condition 4 provided for the payment of a royalty on the first edition, and condition 5 provided for a royalty on a subsequent edition if any. By condition 16, " In the case of the publishers the benefits and liabilities, and in the case of the author the liabilities under this agreement, shall not be transferred or assigned by either party to any person or persons whomsoever without the written consent of the other party " ; and condition 18 provided that " the copyright shall be vested in the author and the publishers equally and no arrangements for the transfer of such copyright or the rights of translation and publication in any other language shall be concluded without the consent in writing of both parties to this agreement."

Having concluded that agreement with the plaintiff, the defendants published his book. They subsequently made an agreement with a Mr. Burgess under which he was to write and the defendants were to publish a book called " Antique Furniture." Any book on that subject, published at the present time, would necessarily contain as a very important part of the subject a treatise on English furniture of the eighteenth century, and, appreciating that fact, the defendants lent Mr. Burgess the plaintiff's book ; but they did not tell the plaintiff that they were bringing out another book dealing with antique furniture. Mr. Burgess produced in a few weeks the book which is complained of in this action.

The plaintiff says that his rights have been infringed, and he contends, first, that it is an implied term of the agreement that the

defendants will not do anything which may injure the plaintiff's royalty or the copyright of his book. An implied covenant in those terms would include a covenant not to publish even a competing book, and it seems to me impossible to read into the agreement a covenant in such wide terms as that. The doctrine of implied covenants or covenants in law is one that must be applied with scrupulous care, and the Court must be careful to see that it is not adding an additional term to the contract, but is only giving effect to a stipulation which is really involved in it. To imply a term of the scope above indicated would be in my judgment to improve the contract from the plaintiff's point of view, and it is not admissible.

It is further said on behalf of the plaintiff that apart altogether from contract the copyright is vested in the plaintiff and defendants as co-owners, and that the defendants have infringed it or made such use of the work as would, if made by a stranger, have amounted to infringement. The defendants say they have not infringed the copyright, and that if they have they are entitled as part owners to use the property of which they are part owners, and that that covers all they have done.

[The learned judge then dealt with the question of infringement and held that the book " Antique Furniture " was an infringement of the copyright in the plaintiff's work " English Furniture of the Eighteenth Century," and he continued :]

I have next to consider whether the plaintiff is entitled to an injunction against the defendants. It is clear, from the cases of *Powell* v. *Head* (1), decided by Jessel M.R., and *Lauri* v. *Renad* (2), decided by Kekewich J., that the plaintiff is in no difficulty as plaintiff because he is only part owner of the copyright. But it is contended that the defendants as co-owners are entitled to use the property subject to accounting to the plaintiff in some way not easy to apply in respect of part of the profits. I think this contention is negatived by the words of the Copyright Act, 1911. By s. 2, sub-s. 1, " copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." By virtue of the Interpretation Act

(1) 12 Ch. D. 686. (2) [1892] 3 Ch. 402.

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the singular includes the plural. Therefore a reproduction without the consent of all the owners is an infringement, and I do not see why one co-owner is not as much within the statute as a stranger. I think that this was really laid down by Sir George Jessel in *Powell* v. *Head* (1) upon practically identical words in 3 & 4 Will. 4, c. 15. Apart, however, from the statute, if this were not so, a part owner would be at the mercy of his co-owners, each of whom, and they might be any number, might issue as many, as large, and as cheap editions as he chose, thus completely ruining the value of the copyright. In my opinion, the old common law rule as to the right of a co-owner to use the common property has no application to such a property as a copyright. It seems to me that a sole right of reproducing, though divisible as to title, must be indivisible as to exercise.

The plaintiff's fourth volume, "English Domestic Clocks," has clearly been plagiarized by Mr. Burgess, but the position with regard to the plaintiff's interest is different. The defendants have the whole property in the copyright and the plaintiff has only royalties on the editions of his own work, with a lien for those royalties. I can find no justification for implying an obligation on the defendants' part not to reproduce in other publications matter of which they alone hold the copyright. In the result, therefore, I grant an injunction to restrain the defendants from infringing the copyright in the first three volumes.

*Judgment for plaintiff.*

Solicitors for plaintiff: *Foulger, Robinson & Miller.*
Solicitors for defendants: *Tamplin, Taylor & Joseph.*

(1) 12 Ch. D. 686.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1916
*May* 24;
*June* 2.

## J. R. MUNDAY, LIMITED *v.* LONDON COUNTY COUNCIL.

*County Court—Practice—Action of Negligence—Payment into Court with Denial of Liability—Form of Notice—Negligence admitted—Damage denied—County Court Rules*, 1903 *and* 1914, *Order* IX., *r.* 12.

The plaintiffs claimed damages in the county court for injury to their horse caused through the negligence of the defendants' servant. The defendants paid into Court under Order IX., r. 12, of the County Court Rules, 1903 and 1914, a sum of 40*l.* with the following notice: "Take notice that the defendants admit that the accident was caused through their negligence, but that they deny the alleged damage, and, whilst in this manner denying liability, they bring into Court the sum of 40*l.*, and 2*l.* 9*s.* 10*d.* in respect of costs, and say that this sum is sufficient to satisfy the plaintiffs' claim":—

*Held*, that this notice was not embarrassing, but a valid and proper notice, as, although it admitted negligence, it put in issue the damage and that the horse was the property of the plaintiffs.

Decision of Divisional Court affirmed.

APPEAL from the decision of Avory and Lush JJ., sitting as a Divisional Court; reported [1916] 1 K. B. 159.

The action was commenced in the Lambeth County Court. The plaintiffs' particulars of claim alleged that on December 18, 1914, at about 6.15 P.M., a horse the property of the plaintiffs was being driven along Walworth Road, when at a spot opposite Liverpool Street a tramcar the property of the defendants and driven by one of their servants came up behind and collided with the plaintiffs' horse and caused it to bolt, whereby it was injured; and that the tramcar collided with the horse owing to the negligence of the driver. The plaintiffs claimed 70*l.* damages.

The defendants under Order IX., r. 12, sub-r. 1, of the County Court Rules, 1903 and 1914, paid the sum of 40*l.* into Court with a notice denying liability in the following form: "Take notice that the defendants admit the accident was caused through their negligence, but that they deny the alleged damage, and, whilst in this manner denying liability, they bring into Court the sum of

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40*l.*, and 2*l.* 9*s.* 10*d.* in respect of costs, and say that this sum is sufficient to satisfy the plaintiffs' claim."

The plaintiffs recovered 40*l.* damages and no more. The defendants claimed the costs of the action, but the plaintiffs contended that the payment into Court was invalid on the ground that the notice admitting negligence and denying liability was contradictory and inconsistent and a mere sham. The county court judge, on the authority of *Critchell* v. *London and South Western Ry. Co.* (1), held that the notice was invalid and a sham and gave the plaintiffs the costs of the action. The defendants appealed.

Avory and Lush JJ., sitting as a Divisional Court, being of opinion that *Critchell* v. *London and South Western Ry. Co.* (1) did not apply, reversed the decision of the county court judge and gave the defendants the costs of the action. They held that the notice was not an admission of liability, and that, although it admitted the accident was caused by the negligence of the defendants' servant, it did not admit the horse was the property of the plaintiffs and denied that the plaintiffs had suffered any damage. (2)

The plaintiffs appealed.

*Doughty*, for the appellants, urged the same arguments as in the Court below, and referred to the County Courts Act, 1888, s. 107; County Court Rules, 1903 and 1914, Order IX., r. 12, Order LIV., r. 22, and Form 75 in the Appendix; *Critchell* v. *London and South Western Ry. Co.* (1); *Remmington* v. *Scoles*. (3)

*Craig Henderson*, for the respondents, was not called upon.

LORD READING C.J. This is an appeal from the decision of the Divisional Court, which reversed the judgment of Judge Parry. The action was brought by the plaintiffs to recover damages caused by the negligence of the defendants. The defendants paid a sum of money into the county court and gave a notice in these words: [His Lordship read the notice and continued:] It is said that notice is embarrassing and that in point of form it is wrong, because it is an admission and at the same time a denial of liability, and is, in effect, a sham. When the matter

(1) [1907] 1 K. B. 860. (2) [1916] 1 K. B. 159.
(3) [1897] 2 Ch. 1.

came before the learned county court judge he gave judgment for 40*l.*, which was the total sum recovered by the plaintiffs. The defendants did not contest that the plaintiffs had in fact suffered some damage, and the 40*l.* which they had paid into Court with the denial of liability was, according to their view, the total sum. But the question upon this state of facts was what was to happen with regard to the costs of the action. The plaintiffs' case was that the defendants had paid in this 40*l.* not with a genuine denial of liability, but merely to prevent the plaintiffs taking the money out of Court except in satisfaction of the claim, and that in truth the position was that the defendants knew they were liable both for the negligence of their servant and for some damage to the plaintiffs which the defendants assessed at a maximum of 40*l.*, and that they ought to have paid in that amount with an admission of liability, in which case the plaintiffs could then have taken it out and gone to trial in order to get more damages. The difference, and sometimes a very important difference, is that in the one case—that is, payment into Court with an admission of liability—the plaintiff can take the money out; in the other, with a denial of liability, he cannot get the money out until he has established the liability of the defendant, unless he takes it out in satisfaction of his claim. It is said that defendants very often take this course because it has the effect of preserving the money paid into Court if the plaintiff will not accept it in satisfaction of the claim, so that, should he proceed to trial and not get more than the money paid into Court, the defendant has the advantage of having that sum either as pro tanto security, or it may be in complete satisfaction of the costs which, if successful, he recovers from the plaintiff. It is said in this case that because of the form of the notice the defendants cannot get the benefit of this course. It is not in dispute that defendants are entitled to pay money into Court with a denial of liability, but Mr. Doughty contends that a denial of this kind, which admits negligence but denies damage, is only a sham, and that the Court ought so to decide. The first ground of his contention is that the defendants admit the accident was caused through their negligence, and he says that the use of the word "accident" implies, and necessarily implies, negligence that caused some

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damage, and must mean negligence which caused a collision or something which resulted in damage, even though it may be only a farthing damage; and he says, that being so, the cause of action is really admitted. Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist. Mr. Doughty says that the defendants by the notice admit that the two co-exist, but only dispute the amount, and if he made out that contention he would, I think, go a very long way to establish his argument. But I cannot read the notice as meaning that; for the defendants in the plainest terms make it clear that they are drawing a distinction between admission of the negligence and admission of the damage, and I cannot come to the conclusion that they have admitted in any way that their negligence did cause damage to the plaintiffs. That being so, it disposes of this appeal, because, unless Mr. Doughty can establish that the notice in form is wrong in the sense that it is embarrassing because it admits the cause of action and at the same time denies it, he would be out of Court.

It is unnecessary to go through either the County Courts Act or the Rules or the forms, because there is no dispute or doubt but that a defendant is entitled to pay money into Court with a denial of liability in the county court. There is an order and a form which specially provide for it, and the only question is whether that order and form were complied with. It is well to observe that there is also Order LIV., r. 22, of the County Court Rules, which provides that all documents are to be in form similar to the forms in the appendix, where the same are applicable; and in cases where such forms are not applicable parties are to frame documents, using as guides the form in the appendix. But no one would suggest, because the language of a form is not precisely the same as the form in the appendix, that consequently the form is invalid. One must look at the substance of it. I have no doubt that the defendants intended by this notice to admit the negligence but nevertheless to deny that it had resulted in damage and consequently to deny the cause of action. That being so, I can see no ground for saying that the notice was a sham. There are no facts in this case which, in my opinion, would in law amount to evidence that the defence was a sham; at most, all that can be said is that

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the defendants intended to deny the liability in order to put the plaintiffs to proof of damage, and that they are entitled to do. I think the judgment of the Divisional Court was right.

WARRINGTON L.J. I am of the same opinion and have nothing to add.

SCRUTTON J. I agree.

Solicitors for appellants: *Clifford, Turner & Hopton.*
Solicitor for respondents: *E. Tanner.*

H. L. F.

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[IN THE COURT OF APPEAL.]

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*May* 15; *June* 8.

## PERRY *v.* LONDON GENERAL OMNIBUS COMPANY.

[1916 P. 392.]

*Practice—Poor Person—Plaintiff admitted to sue as Poor Person—Action of Tort—Jurisdiction to remit Action to County Court—Action "fit to be prosecuted in the High Court"—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 66—*Rules of the Supreme Court, Order* XVI., *rr.* 22—31 (*I.*).

The fact that a plaintiff has been admitted to take proceedings in tort in the High Court as a poor person under Order XVI., rr. 22—31 (I.), does not take away the jurisdiction of the Court under s. 66 of the County Courts Act, 1888, to remit the action for trial in the county court.

The plaintiff obtained leave to bring an action in the High Court as a poor person against the defendants to recover damages for personal injuries from an accident caused by their alleged negligence. The plaintiff, who was a widow sixty-nine years of age, was at the time of the accident earning 7*s.* a week, and lived with her daughter, to whom she paid 2*s.* 6*d.* a week. Upon the application of the defendants under s. 66 of the County Courts Act, 1888, the judge in chambers remitted the action for trial in the county court, adding to his order that the plaintiff should be at liberty to sue as a poor person in the county court:—

*Held*, (1.), by the whole Court, that the judge had power to remit the action to the county court, but had no power to order that the plaintiff should be at liberty to sue in the county court as a poor person.

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(2.) By Swinfen Eady and Phillimore L.JJ., that the judge had properly exercised his discretion in remitting the action; by Bankes L.J., that as the plaintiff had no means whatever and might therefore be unable to prosecute her claim in the county court, the action was more fit to be prosecuted in the High Court than in the county court, and that the judge ought to have exercised his discretion by refusing to remit the action.

*Semble, per* Phillimore L.J.: A county court judge has jurisdiction to admit a plaintiff to sue as a poor person in the county court.

APPEAL from an order made by Ridley J. in chambers.

The action was brought to recover damages for personal injuries caused by the alleged negligence of the defendants. The accident to the plaintiff happened on January 25, 1916. On February 19 the plaintiff applied to the prescribed officer under the Rules of the Supreme Court, Order XVI., rr. 22–31 (I.), to be admitted as a poor person to institute proceedings against the defendants in the High Court. On February 29 the plaintiff was admitted as a poor person, and on March 9 the writ in the action was issued. The defendants thereupon applied under s. 66 of the County Courts Act, 1888, that the action should be remitted to the county court. It appeared from the affidavits made on this application that the plaintiff, who was a widow of the age of sixty-nine years, was a charwoman earning 7*s.* a week and her keep; that she lived with her married daughter, to whom she paid 2*s.* 6*d.* a week; and that in consequence of the accident her left arm was broken at the elbow, which incapacitated her for work for some weeks, and before the application to remit came on for hearing she had attempted to resume her work, but she found that she had not the use of her left arm, and was in consequence unable to perform her duties. On April 17 the Master dismissed the application as he did not think he ought in the circumstances to make an order remitting the action to the county court, and as, in his opinion, the action was one "fit to be prosecuted in the High Court." Upon appeal Ridley J. reversed the order of the Master, and remitted the action to the county court for trial, "the plaintiff to be at liberty to sue as a poor person in the county court."

The plaintiff by leave appealed.

*Bankes, K.C.*, and *Zeffertt*, for the plaintiff. When an order has been made admitting a plaintiff to sue in the High Court as a poor

person the action cannot be remitted to the county court under s. 66 of the County Courts Act, 1888. Upon the hearing of the application to be admitted to sue as a poor person the Master must, under Order XVI., r. 27, "have regard to" the provisions of s. 66, that is to say, he has to consider whether the plaintiff has "a cause of action fit to be prosecuted in the High Court." That matter has therefore been already considered by the proper tribunal and decided in the plaintiff's favour, and once the plaintiff has been admitted to sue in the High Court as a poor person the Court has no jurisdiction to remit the action for trial to the county court under s. 66. If the order has been wrongly obtained, the proper course is to apply to discharge it under r. 28A. If any other view is taken, the Poor Persons Rules will be greatly impaired, because leave to sue in the High Court as a poor person is granted on proof that the plaintiff is without means, which is the very fact forming the foundation of an application to remit under s. 66. An order for security for costs is superseded by an order giving the appellant leave to appeal as a poor person: *Willé* v. *St. John.* (1) So also an order giving a plaintiff leave to sue in the High Court as a poor person prevents any order being made under s. 66. No rules have been made in the county court under s. 164 of the County Courts Act, 1888, allowing a plaintiff to sue in that Court as a poor person, and therefore, if this order stands, the plaintiff will be deprived of the benefit which the Court has given her of suing as a poor person in the High Court. If, however, the county court judge has power under the last clause of s. 164 to allow the plaintiff to sue in the county court as a poor person, as stated in *Chinn* v. *Bullen* (2), the judge is not under any obligation to do so, and even if he does allow the plaintiff so to sue he cannot remit the fees payable to the Treasury, such as the plaint fee and the hearing fee (see Annual County Courts Practice, 1916, pp. 1053, 1055), and cannot assign solicitor or counsel. An action when remitted under s. 66 becomes a county court action: *Moody* v. *Steward* (3); and the High Court has no jurisdiction over it. Therefore the latter part of the order of the learned judge, giving the plaintiff leave to sue in the county court as a poor person, was made without jurisdiction.

(1) [1910] 1 Ch. 701. (2) (1849) 8 C. B. 447.
(3) (1870) L. R. 6 Ex. 35.

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Secondly, if the learned judge had jurisdiction to remit, he ought not to have remitted the action. The injury to the plaintiff is serious, and the action is one " fit to be prosecuted in the High Court " within the meaning of s. 66.

*Clavell Salter*, *K.C.* and *Jowitt*, for the defendants. With regard to the question of jurisdiction, s. 66 of the County Courts Act, 1888, is clear and unqualified, and it was passed when rules allowing persons to sue in forma pauperis were in existence. There is no exception on the face of the enactment. If the argument on behalf of the plaintiff is correct, the Master has to say upon an ex parte application, before the action is brought and before he has had an opportunity of hearing the defendants, in what Court the action shall be tried. Order XVI., r. 27, cannot have the effect of depriving the defendants of their statutory right to apply under s. 66 to have the action remitted to the county court. Under r. 27 the Master has to consider, where there is concurrent jurisdiction, whether a plaintiff, though a poor person and unable to pay High Court costs, can pay county court costs, and on that ground may refuse to admit the plaintiff to sue in the High Court as a poor person, knowing that the action will probably be remitted to the county court under s. 66 if the plaintiff is admitted to sue in the High Court as a poor person. If, on the other hand, he finds that the plaintiff is a very poor person, and cannot pay costs at all, he will probably make the order admitting him to sue as a poor person, and leave the defendant to apply under s. 66 to have the action remitted to the county court. In this way the Master " shall have regard to " s. 66. Rule 27 does not say that the Master shall decide which tribunal shall hear the case. The plaintiff is not in this view deprived of any benefit she has already obtained of suing as a poor person. Under the concluding words of s. 164 of the County Courts Act, 1888,—" In any case not expressly by this Act or in pursuance thereof provided for the general principles of practice in the High Court may be adopted and applied to actions and matters "—the county court judge may allow the plaintiff to sue as a poor person in the county Court: *Chinn* v. *Bullen* (1), a decision on similar words in s. 78 of the y Courts Act, 1846. The action will go to the county court as a action begun in the High Court by a poor person, the damages

(1) 8 C. B. 447.

not being limited to the amount within the ordinary jurisdiction of the county court, and the county court judge will follow the order of the High Court, and allow the plaintiff to continue the proceedings in the county court as a poor person. But possibly the plaintiff is in a better position than that, because under s. 66 the action when remitted becomes a county court action as if it had been commenced in that Court, and the order already made allowing the plaintiff to sue as a poor person is to be deemed to have been made in the county court. A plaintiff, therefore, who is admitted to sue in the High Court as a poor person may have his action tried in the High Court or in the county court, and in either case he retains the privilege of suing as a poor person. [*Hemming* v. *Davies* (1) was also referred to.]

If the learned judge had jurisdiction under s. 66, he rightly exercised his discretion by remitting the action to the county court. "Fit to be prosecuted in the High Court" in s. 66 means more fit to be prosecuted in the High Court than in the county court: *Farrer* v. *Lowe*. (2) It cannot be said that this action is more fit to be prosecuted in the High Court than in the county court. The Court will not interfere with the learned judge's exercise of his discretion.

*Bankes, K.C.*, in reply.

*Cur. adv. vult.*

June 8. SWINFEN EADY L.J. read the following judgment:— This is an appeal by the plaintiff from an order of Ridley J. made on May 2, 1916, remitting the action for trial to the county court pursuant to s. 66 of the County Courts Act, 1888. The plaintiff is a widow sixty-nine years of age, employed as a charwoman at 7*s.* per week and her keep. On January 25, 1916, she met with an accident and broke her left arm at the elbow. She alleges that the accident was occasioned by the negligence of the defendants, and that she will never again be able to work to the same extent as heretofore. She desired to bring an action against the defendants for the injuries which she alleges she sustained through their negligence. On February 29 she obtained an order admitting her to sue as a poor person under the Rules of the Supreme Court (Poor Persons), 1914, in accordance with a report which had been made, and on

(1) [1898] 1 Q. B. 660. (2) (1889) 53 J. P. 183.

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March 9 she issued a writ against the defendants. The defendants then applied to remit the action to the county court for trial. Master Chitty on April 17 refused the order, but it was made by Ridley J. on appeal on May 2, and it is against this order that the plaintiff now appeals.

The first point taken on her behalf is that, as she had obtained an order admitting her to sue in the High Court as a poor person, the judge had no jurisdiction to remit her action for trial in a county court. The jurisdiction to remit in the case of actions of tort is conferred by s. 66 of the County Courts Act, 1888. The section extends to all actions of tort, whether the action could or could not originally have been commenced in the county court. Thus the county court has not original jurisdiction where the claim is in respect of libel, slander, or seduction; nor where the damage claimed exceeds 100*l*. According to the tenor of s. 66, a judge of the High Court has power to remit any action of tort whenever the circumstances are such as to bring it within the provisions of the section, and I am quite unable to read into the section an exception not contained in it, namely, where the plaintiff is a person admitted to sue in the High Court as a poor person. It is urged that, unless the section be so construed, a person may obtain a poor person's order and yet derive subsequently no advantage from it. But such a person will already have obtained some advantage from the order admitting him to sue as a poor person, as he will have issued his writ without fee; the application to remit cannot be made until after the action has been commenced.

Reliance was placed by the appellant on Order XVI., r. 27, but in my opinion it does not assist her on this point. In considering whether a person shall be admitted to the High Court as a poor person regard is to be had to the existence of a concurrent jurisdiction in an inferior Court—that is, if the demand is within the jurisdiction of an inferior Court, and the judge thinks that the action may be more properly brought there, he may refuse leave to sue in the High Court as a poor person. Again, if the cause of action is not within the jurisdiction of an inferior Court, but the judge thinks that it would be more properly tried there, he may still admit the applicant to sue as a poor person in the High Court, being mindful of the provision which enables actions properly brought in the High

Court to be remitted for trial in the county court. The direction in r. 27 that the judge is to have regard to the provisions of ss. 65 and 66 of the County Courts Act, 1888, operates, in my opinion, in favour of poor persons, that is, in favour of giving leave, notwithstanding the view that the action should be tried in the county court, because there is power to remit, which extends to and includes actions which could not be commenced in the county court as well as actions which might have been so commenced. It cannot be that the judge is especially to have regard to the power to remit with a view of refusing the poor person's application. Cases which could be brought in the inferior Court are within the earlier part of the rule; cases which could not be brought in the inferior Court are only within the latter part of the rule, and if with regard to such cases the judge is to be influenced by the power to remit, against the poor person's application, the poor person would be deprived of remedy in that class of case.

Again, the application for leave to sue as a poor person is made ex parte, and if the Master accedes to it the matter does not come before the judge personally. It cannot have been intended that the defendant should be bound to allow the action to remain in the High Court without ever having had an opportunity of being heard on the subject, and that the statutory power of the judge under ss. 65 and 66 of the County Courts Act should be taken away by an ex parte order made by a Master in chambers. Moreover, when an order is made admitting a person to sue in the High Court as a poor person, the Master has before him the report and any documents or information obtained for the purposes of the report, but these are to be treated as confidential, and shall not be shown or disclosed to the parties or either of them: Order XVI., r. 25. This is an additional reason why a defendant should not be deprived of his right to apply to remit under s. 66 by the fact of the poor person's order having been made. He would be deprived of his statutory right by an order made without notice to him and upon materials not open to his inspection.

The fact that a poor person's order may in a proper case be discharged under r. 28A does not affect this question. An order may have been quite properly made, and so long as the action remains in the High Court it may be quite fit that it should be prosecuted

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in that Court as a poor person's action, and yet it may be quite right and proper to remit it to a county court under s. 66. One object of s. 66 is to protect a defendant against liability for High Court costs where a plaintiff cannot pay if he loses the action. It would be a curious result if the section failed to protect him just where he has the greatest need of protection, namely, where the plaintiff has no means whatever, visible or invisible. In my judgment, the fact that a poor person's order has been made does not take away the jurisdiction of the judge to remit the action, when brought, to a county court for trial.

The other question raised by this appeal is whether the order of Ridley J. was right on the merits of the case. It is not suggested that any difficulty will arise in the trial of the action. The issue is simply whether the plaintiff's accident was or was not occasioned by the defendants' negligence. The damages cannot be large. The plaintiff, who was earning 7*s.* a week at the date of the accident, attempted to resume her duties on or about April 6. She had then so far recovered from her broken arm that she felt that she could make an attempt to resume her work, but she found that she had not then recovered the use of her left arm, and had to desist. Possibly by now she may have quite recovered. On the other hand, possibly she may never completely recover, and there may always remain a partial incapacity for work making her labour saleable for less than it would otherwise fetch. This is a matter for evidence at the trial. But, having regard to the plaintiff's age and position and to her rate of wage at the time of the accident, the damages cannot be large. It is not suggested that there are any circumstances of aggravation, nor are there any other cases depending on this case. Every test or consideration applied, except one, leads to the conclusion that this case is one more fit to be tried in the county court than in the High Court: *Banks* v. *Hollingsworth.* (1) The consideration pointing the other way is the order already obtained by the plaintiff, whereby she has secured the advantages which a poor person's order now gives. But that alone cannot be taken as outweighing all other considerations and as determining that the plaintiff has a cause of action fit to be prosecuted in the High Court. If it were so to operate, it would effectually take away the power

(1) [1893] 1 Q. B. 442.

to remit. There was in my opinion ample ground upon which Ridley J., in the exercise of a judicial discretion and after a reasonable and careful consideration of the facts of the case, could arrive at a conclusion that an order ought to be made for trial in the county court. The decision of the judge was a decision on circumstances which were well within his discretion to consider; and moreover, in my judgment, that discretion was soundly exercised, and the appeal fails.

The judge, however, made a slip by adding at the end of his order the words "the plaintiff to be at liberty to sue as a poor person in the county court," and the order should be amended by striking out these words. In my judgment, subject to this amendment or variation of the order, the appeal should be dismissed.

PHILLIMORE L.J. read the following judgment:—This is an appeal from an order of the judge at chambers reversing the order of a Master, and ordering that the action be remitted to the county court for trial, the plaintiff to be at liberty to sue as a poor person in the county court.

The action is brought by a poor person under the rules of the High Court relating to proceedings by and against poor persons, Order XVI., rr. 22 to 31 (I.) inclusive, and is for personal injuries. The application which led to the order under appeal was made under s. 66 of the County Courts Act, 1888. Under that section, if the defendant in an action of tort brought in the High Court makes an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, a judge of the High Court has power to require the plaintiff to give security for costs, or satisfy him that he has a cause of action fit to be prosecuted in the High Court, and, failing such security or satisfaction, to remit the action for trial in a county court. It was proved in this case, and indeed arose from the nature of things, that the plaintiff would not be able to pay the defendants' costs if she failed; and thereupon it became the question whether she had a cause of action fit to be prosecuted in the High Court. The Master thought that she had, and the judge thought that she had not.

Two lines of argument were developed by counsel for the appellant.

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First, it was said that upon the merits of the case apart from the question about poor persons procedure the action was one of sufficient gravity for trial in the High Court. Secondly, that it was no longer open to the defendant company to contend that it was not, inasmuch as this question had been prejudged when the plaintiff was admitted to take proceedings as a poor person.

As to the first point, which is one rarely brought before the Court of Appeal, I see no reason for interfering with the order of the judge at chambers. There is no limit to the amount which a county court can award in a remitted action. The plaintiff can have a jury. Upon her two affidavits put before us it would appear that, though her injuries were serious, there is no certainty that serious consequences will be permanent. Her pecuniary loss—her wages being only 7*s.* a week—must be small, and there do not appear to be any out-of-pocket expenses. Forming the best opinion that I can after many years' experience, I do not think it likely that she would recover 100*l.*, which is the normal limit of the jurisdiction of the county court.

The Master, we are told, considered, in addition to the affidavits put before him and sworn in the action, materials laid before the Master to whom applications under the Poor Persons Rules are referred with a view to induce him to admit the applicant as a poor person. I do not think that he was right to take into consideration these unsworn and ex parte statements in aid of the plaintiff's case when the matter came to be decided inter partes. These materials were not, and I think properly were not, submitted to the judge or to us. A further objection to their use is to be found in the provisions of the last paragraph of r. 25.

As to the second point, it is in substance that, under the present procedure and after the inquiries which are directed to be made before an applicant be admitted to sue as a poor person, it must be deemed that such an admission carries with it a judicial pronouncement that the action is fit to be prosecuted in the High Court, and excludes any application under s. 66. "Fit to be prosecuted in the High Court" means fit to be prosecuted in that Court rather than in the county court—more fit to be tried in the High Court. It is said that r. 27 shows that this is an inquiry which must be made before the Court or a judge admits an applicant to sue as a poor

person, and though made ex parte is conclusive against the defendant applying under s. 66. The rule is as follows: "The Court or a judge in considering whether a person shall be admitted as a poor person under these rules shall have regard to such statutory provisions as confer on inferior Courts concurrent jurisdiction with the High Court and especially to the provisions of section 65 and section 66 of the County Courts Act, 1888." It is not very easy to see what the intention of the framers of this rule was. The reference to the concurrent jurisdiction of inferior Courts means, I think, that the existence of this jurisdiction is to be considered as a reason for non-admission. Then, is the reference to ss. 65 and 66 intended to run on the same lines as a further consideration in favour of non-admission, or the reverse? Juxtaposition and the use of the word "especially" would rather tend to show that it was on the same lines. But a good argument could be raised in favour of the opposite contention. No great harm, it might be thought, would be done to the defendant by authorizing an applicant to sue him as a poor person, because the defendant could in a proper case get the action tried by the cheaper procedure of the county court. And in the case of s. 65 it might work out very practically in this way. Perhaps the references to ss. 65 and 66 were intended for both purposes, so that the consideration of them would in some cases lead the Court or a judge one way, and in other cases the other.

But, whatever may be the meaning of this rule, I cannot construe it as effecting by a side wind a repeal pro tanto of s. 66. It is not necessary to embark upon the difficult question whether a rule of Court made under a statutory power can repeal or limit the provisions of an Act of Parliament. Sure I am that, if it be possible, a rule should not be construed as purporting to have this effect. Further, upon the reason of the thing, it would be unjust that a defendant should be told that his rights under s. 65 or s. 66 should be taken away by reason of an inquiry made behind his back upon unsworn testimony.

There is yet another consideration. The admission of a poor person is made by a Court or a judge. That means it may be made by a Master, and if he refuses, then on appeal by a judge—that is, on the poor person's appeal. But the future defendant has no voice in the matter. And if the Master makes the order, the matter

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never comes to be considered by the judge. The argument for the appellant in this case is that the decision of the Master on the ex parte application is to bind not only a subsequent Master on the application inter partes, but the judge on appeal. The force of these considerations is very little diminished by the fact that under r. 28A it may be possible to dispauper a poor person.

I have so far stated the arguments as they were put before us, or at least as they reached my apprehension. But further consideration has produced a third argument in favour of the appellant which is a more subtle one. For the purposes of this argument it is admitted that the judge may exercise the power given by s. 66 notwithstanding that the plaintiff has been admitted to sue as a poor person. It is also admitted that the nature of her injuries might not be per se sufficiently grave to warrant the retention of the cause in the High Court. But it is said that the fact that the plaintiff has been admitted to sue as a poor person in the High Court, and will, as it is contended, lose these benefits if the case is remitted to the county court, forms an element in the inquiry whether the case is more fit to be tried in the High Court than in the county court, and so important an element that the judge should (unless he thought that the plaintiff had been wrongly admitted to sue as a poor person) retain the cause in the High Court. This argument loses nearly all its force if the plaintiff be admitted to sue as a poor person in the county court, as she may be: *Chinn* v. *Bullen* (1); and see the Annual County Courts Practice, 1916, p. 1024. And though this procedure is unusual, and though on reflection I am prepared to agree with the other members of the Court that Ridley J. had no power to dictate it, and that this part of his order should be struck out, I see no reason why it should not be adopted where the plaintiff has been admitted to sue as a poor person in the High Court; and indeed I should hope that the county court judge would see his way to doing so.

Be this as it may, s. 66 is a provision for the benefit of defendants sued in the High Court for a cause of action suitable for the county court by plaintiffs who cannot, if defeated, pay their costs; and we must consider their rights as well as those of plaintiffs. I cannot think that it is reasonable to say to a defendant, "If all we knew

(1) 8 C. B. 447.

was that the plaintiff could not pay your costs we should on your application send this case to the county court; but, inasmuch as we know that she is so miserably poor that she cannot pay her lawyers and possibly not even the Court fees, we shall keep this case in the High Court and saddle you with High Court costs." In this connection I return to the clause in r. 27 which requires the Court or a judge, in considering whether a person shall be admitted to sue as a poor person, to have regard to such statutory provisions as confer on inferior Courts concurrent jurisdiction with the High Court, a clause which, as I have already said, must be considered as introducing a reason for non-admission, not as a reason for admission. The intention of this rule seems in this respect to be plain. If so, those who framed the rule did not mean to admit persons to sue as poor persons in the High Court if there was a convenient inferior Court of sufficiently wide jurisdiction notwithstanding that poor persons procedure is unusual in that inferior Court.

I think that the order appealed from is right and should be affirmed.

BANKES L.J. read the following judgment:—This is an appeal which raises important questions as to the proper construction to be put upon the rules of Court relating to proceedings by poor persons. The plaintiff is a widow who earns her living as a charwoman. She sustained an injury to her arm owing, as she alleges, to the negligence of the defendants' servants. She made an application to be admitted to take proceedings in the High Court as a poor person under Order XVI., r. 22 and the following rules. On February 29 last an order was made granting the application. The order is in the prescribed form contained in Appendix K. On March 9 the plaintiff issued a writ, and on March 27 the defendants applied under s. 66 of the County Courts Act, 1888, that the action should be remitted to the county court. This application came before Master Chitty, who refused to make any order. On appeal Ridley J. reversed Master Chitty's order and directed that the action should be remitted to the county court, adding to his order the words "the plaintiff to be at liberty to sue as a poor person in the county court." Ridley J. apparently considered that he had power to make an order which would bind the county court judge

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as to the right of the plaintiff to sue in forma pauperis in the county court. I cannot agree with this view, and I do not understand that Mr. Salter is prepared to defend the latter portion of the order. A county court judge may have an inherent jurisdiction to permit a person to sue in his Court in forma pauperis; but in my opinion a judge of the High Court has no power either to extend the provisions of Order xvi. with regard to poor persons to proceedings in any Court other than the High Court, or to give any directions which will be binding on a county court judge on a matter which is entirely within his own discretion. Whether Ridley J. would have made an order remitting the action to the county court without words intended to preserve the plaintiff's already acquired right to sue as a poor person I do not know. It is, however, clear, I think, that the order as made cannot stand. This conclusion does not, however, dispose of what are the really important points in the case. These are—(1.) whether the learned judge had any jurisdiction to make any order at all; and (2.) if he had, how far, if at all, the question of the plaintiff's means should be taken into consideration when exercising his discretion. Upon both questions the easiest way to arrive at a conclusion appears to me to be to take a simple case and to see how in practice the rules applicable to proceedings by poor persons work. In the case, for instance, where an applicant has a claim in contract for 20*l.* for goods sold and delivered, or a claim in tort for 20*l.* damages for a nuisance, the Master on the hearing of the application to be admitted to sue as a poor person must, in accordance with the provisions of r. 27, have regard to the fact that in either of the cases I have mentioned the county court has concurrent jurisdiction with the High Court. The object of this rule must be that if under all the circumstances of the case the Master thinks that the action is one which the applicant should prosecute in the county court, he should refuse to make an order giving him leave to proceed in the High Court as a poor person. One of the matters, however, which it appears to me to be necessary that the Master should take into consideration before coming to any decision on this point is the question of the applicant's means. If on the materials before him the Master should come to the conclusion that the applicant, although not worth more than the sum sufficient to justify his application to

proceed as a poor person in the High Court, is yet possessed of sufficient means to enable him to prosecute his action in the county court, he would in my opinion be justified in the exercise of his discretion in refusing to allow the applicant to proceed as a poor person in the High Court. On the other hand, if on the materials before him the Master came to the conclusion that, though the applicant's claim was one which could properly be proceeded with in the county court, the applicant was not possessed of sufficient means to enable him either to commence proceedings in the county court or to prosecute them there if commenced, he would not in my opinion be justified in refusing to make an order giving the applicant leave to proceed in the High Court as a poor person. Any other construction of the provisions of r. 27 would, as it appears to me, defeat the whole object with which the Poor Persons Rules were framed, and which I gather from the rules to be that where a person has satisfied the proper authority that he has a good cause of action he shall be assisted in prosecuting that action, not only by being excused from paying fees, but by having assigned to him for his assistance an approved solicitor and counsel. No machinery exists in the county court for ascertaining whether an applicant has a good cause of action or not, and there are no rules in the county court corresponding to the High Court Rules. The inference appears to be that, where an applicant has not sufficient means to prosecute his action either in the county court or in the High Court, such assistance as is provided for in the High Court Rules, if it is to be rendered to him at all, is to be rendered in the High Court and not in the county court.

I return now to consider the procedure under the rules in the event of the Master making an order on the application. The order being made ex parte, the first notice that the defendant has of the order is either a solicitor's letter informing him of the order which has been made, or possibly service of the writ itself. At this stage it is clearly open to the defendant to apply under r. 28A that the order granting the applicant leave to proceed should be discharged, and one ground upon which such an application could be supported would be that the Master ought to reconsider the question of whether the action is not one which should be prosecuted in the county court rather than in the High Court. In substance this is

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the same question which has to be considered upon an application under either s. 65 or s. 66 of the County Courts Act, 1888, in every case where the action is one in which the county court has concurrent jurisdiction with the High Court. Dealing with the question in this way, there seems nothing inconsistent with the rules relating to proceedings by poor persons in giving effect to these sections. I have so far only considered the position in relation to actions in which the county court has concurrent jurisdiction with the High Court. It seems only natural, if with regard to this class of actions the rules provide machinery for a consideration of the question of whether an order giving leave to proceed as a poor person should be made, or possibly discharged, on the ground that the action should be, or should have been, commenced in the county court, that provision should also be made for remitting actions which could not have been commenced in the county court, but which ought to be continued in that Court. This I conceive to be the reason for the insertion of the last part of r. 27 requiring the Master to have regard to the provisions of ss. 65 and 66 of the County Courts Act, 1888.

I come, therefore, to the conclusion that the contention of the appellant that the learned judge had no jurisdiction to make an order fails. I have come also to the conclusion that the information supplied by the applicant in her affidavits as to the nature and extent of her injury is so scanty that it is not possible on the ground of the seriousness of the case to her from the point of view of her injuries to say that an order to remit ought not to be made. There remains, therefore, only the question of the appellant's means. It seems clear from the affidavits that the appellant is without any means at all. How far, if at all, ought this fact to be taken into consideration when dealing with the application to remit? This question does not appear to have arisen in any reported case, nor could it arise except upon an application to remit after an order giving a plaintiff leave to proceed as a poor person had been made. In *Banks* v. *Hollingsworth* (1) the question turned upon the construction of clause 12 of the schedule to the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), which provided that no action entered in the Court should before judgment be removed

(1) [1893] 1 Q. B. 442, 447.

from the Court into any superior Court except by leave of the judge of one of the superior Courts in cases which should appear to such judge fit to be tried in one of the superior Courts. In Lord Esher's judgment he points out what matters should be taken into consideration when dealing with an application under this clause. He says: "The question upon an application of this nature is whether, considering all the circumstances of the case and the interests of the parties and of public justice, the case ought to be tried in the High Court rather than in that in which the action was brought, and the judge who has to determine the question of removal must consider all the circumstances." As one instance of a circumstance which the judge should take into consideration Lord Esher mentions the fact that the plaintiff might obtain a more speedy trial in the one Court than in the other. I think these observations are of value in dealing with the particular point which I am now considering, and I do not think that any material distinction can be drawn between the words Lord Esher was dealing with, namely, "action fit to be tried," and "cause of action fit to be prosecuted," which are the words used in s. 66 of the County Courts Act, 1888.

I am further of opinion that for the purpose of this particular point no distinction can be drawn between s. 65 and s. 66 of the County Courts Act, 1888. Both were passed with the same object, and the difference in language is accounted for by the difference in the subject-matter with which the two sections are dealing. In the case of an application to remit under s. 65 the judge is to make the order "unless there is good cause to the contrary." In a case where the plaintiff has no means at all, but has obtained an order giving him leave to proceed in the High Court as a poor person, the alternative presented to the judge on an application to remit under s. 65 is either to make an order, in which case on the materials before him there is no reasonable probability that the plaintiff will ever be able to prosecute his claim at all, or to refuse to make an order, in which case the plaintiff would be able to proceed under the leave and with the assistance already granted to him. In such a case I think that the judge must be entitled to take these matters into consideration and to treat them as good cause and as a ground for refusing to make any order. By similar reasoning upon an

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application to remit under s. 66, if the judge is satisfied that the plaintiff has no means, he must, in my opinion, be entitled to treat the cause of action as more fit to be prosecuted in the High Court than in the county court. If this construction is adopted, the extreme poverty of a plaintiff becomes a ground not only for refusing to discharge an order giving the plaintiff leave to proceed as a poor person, but also for refusing to remit an action which has been brought by a poor person by leave. I am quite aware that this reading of ss. 65 and 66 of the County Courts Act, 1888, will reduce the number of cases to which the power to remit will be applied, and to that extent will reduce the advantages intended to be conferred upon defendants by these sections, and this in cases where the plaintiff has no means at all; but, on the other hand, since the coming into operation of the present rules with regard to poor persons a special class of persons has to be considered, namely, those whose cases have been investigated and favourably reported on and who have satisfied the conditions laid down by the rules, and unless it is open to the Master to exercise his discretion in the way I have indicated a large class of persons will, as it seems to me, be excluded altogether from the benefits which I consider the rules intended to confer upon them. In the present case I am, I think, entitled to assume from the form of the order that Ridley J. did not exercise any discretion on this particular point. Want of means sufficient to enable the plaintiff to prosecute her action in the county court being established by the affidavits, I am for the reasons I have indicated of opinion that no order to remit the action to the county court should be made, and that this appeal should be allowed.

*Appeal dismissed.*

Solicitors for plaintiff: *Zeffertt & Co.*

Solicitors for defendants: *Joynson-Hicks & Co.*

W. F. B.

[IN THE COURT OF APPEAL.]

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*May* 9, 10.

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*Arbitration—Costs—Discretion of the Arbitrator—Costs of Successful Plaintiff—Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *Sched. II., rr.* 14, 15.

The direction in the Agricultural Holdings Act, 1908 (Sched. II., rr. 14, 15), that the costs of and incidental to an arbitration under the Act shall be in the discretion of the arbitrator, does not give him any wider discretion than that exercised by a judge of the High Court. He cannot, therefore, order a plaintiff who has succeeded in recovering a substantial sum, though much less than his claim, to pay the costs of both parties, unless he has before him material which enables him to find that the plaintiff never ought to have taken the proceedings or has been guilty of misconduct.

The case of an arbitration under the Arbitration Act, 1889, where the parties have submitted the question of costs to a tribunal selected by themselves, is different.

Award of arbitrator and decision of the Divisional Court (Ridley and Lord Coleridge JJ.) [1916] 1 K. B. 452 reversed.

The defendant was the tenant of the Abbotson Farm in Hampshire under a lease from Lord Ashburton which expired at Michaelmas, 1913. The tenant claimed compensation from the landlord under the Agricultural Holdings Act, 1908, and the landlord made a claim against the tenant for dilapidations, under a contract contained in his lease, for 744*l.* The valuers appointed by the parties came to an agreement as to the amount due to the tenant, but could not agree upon the amount due to the landlord, and submitted that question to arbitration under the Act. The arbitrator stated a special case for the county court judge on the question of construction of the clauses in the lease under which the landlord claimed compensation for dilapidations. On June 10, 1914, the county court judge made an order on the special case in favour of the tenant. The landlord appealed, and the Court of Appeal on March 15, 1915, allowed the appeal and referred the matter back to the arbitrator to decide the amount due and all questions of costs, including the costs of appeal. The arbitrator made an award dated May 7, 1915,

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that the landlord was entitled to 71*l.* only. With regard to the costs he stated in an affidavit that he had carefully considered the opinion of the Court of Appeal on the special case and the discretionary powers in this respect conferred on him by the Agricultural Holdings Act, 1908, and rules thereunder (1), and after taking into account and carefully considering the reasonableness or unreasonableness of the claim, the conduct of the parties, and generally all the circumstances of the case, he came to the conclusion that it was fair and reasonable that each of the parties should bear his own costs of and incidental to the special case, and of the proceedings in and orders of the county court and the Court of Appeal, and that the remainder of the costs of both parties of the arbitration should be borne by the landlord.

The plaintiff applied to the county court judge to set aside the award on the ground that the arbitrator had no jurisdiction to make a successful litigant pay the costs of his opponent. The county court judge refused the application. The plaintiff appealed to the

(1) 8 Edw. 7, c. 28, s. 13: "(1.) All questions which under this Act or under the contract of tenancy are referred to arbitration shall, whether the matter to which the arbitration relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act."

"(4.) The Arbitration Act, 1889, shall not apply to any arbitration under this Act."

Sched. II., r. 13: "When an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the county court may set the award aside."

Rule 14: "The costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid, and the costs shall be subject to taxation by the registrar of the county court on the application of either party, but that taxation shall be subject to review by the judge of the county court."

Rule 15: "The arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise, and any unreasonable demand for particulars or refusal to supply particulars, and generally all the circumstances of the case, and may disallow the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily.'

Divisional Court, which affirmed the decision of the county court judge. (1) The plaintiff appealed to this Court.

*Disturnal, K.C.*, and *W. Allen*, for the appellant. The arbitrator has found in Lord Ashburton's favour and then ordered him to pay the costs. This is altogether beyond the discretion given to the arbitrator by the Agricultural Holdings Act, 1908. It cannot have been intended to give the arbitrator a wider discretion than that possessed by a judge of the High Court. The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 28, gave the Commissioners in terms a discretion as to all the costs of proceeding before them, but it was held in *Foster* v. *Great Western Ry. Co.* (2) that they had no wider discretion than that vested in the old Court of Chancery, which did not extend to making a successful party pay the costs of his opponent. An apparently absolute discretion as to costs is given to a judge of the High Court by Rules of the Supreme Court, Order LXV., r. 1, and the Judicature Act, 1890, s. 5, but it is settled that the Courts are still bound by the rule laid down by Sir George Jessel M.R. in *Cooper* v. *Whittingham* (3) that where the plaintiff comes to enforce a legal right and is not guilty of any misconduct the Court has no discretion to make him pay the costs. There is a distinction where the parties have chosen their own arbitrator and by their submission given him an absolute discretion as to costs, as in *In re Fearon and Flinn.* (4) But all arbitrators or boards of arbitrators appointed by statute, such as the Railway Commissioners or the county court judge acting as arbitrator under the Workmen's Compensation Acts, are bound by the same rules as the judges: *Simpson* v. *Inland Revenue Commissioners* (5); *Kierson* v. *Joseph L. Thompson & Sons* (6); *Higgins* v. *L. Higgins & Co.* (7) Their discretion as to costs must be exercised judicially and on materials properly before the Court. In this case the county court judge had no materials before him on which he could exercise any discretion.

*Clavell Salter, K.C.*, and *S. H. Emanuel*, for the respondent. The Court is asked to limit the discretion of the county court judge as

(1) [1916] 1 K. B. 452.
(2) (1882) 8 Q. B. D. 515.
(3) (1880) 15 Ch. D. 501, 504.
(4) (1869) L. R. 5 C. P. 34.
(5) [1914] 2 K. B. 842.
(6) [1913] 1 K. B. 587.
(7) [1916] 1 K. B. 640.

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to costs. There is no reason for doing so. An arbitrator is in a different position from a judge, for the discretion of a judge is fixed by law; the discretion of an arbitrator arises from the voluntary submission of the parties. There is no question that if a discretion as to costs is expressly included in the submission it is absolute: *In re Fearon and Flinn.* (1) A judge has the same power if a plaintiff recovers only a nominal sum: *Harris* v. *Petherick.* (2) Under the Agricultural Holdings Act, 1908, the tenant is obliged to submit his claims to arbitration; the landlord is not bound to submit his claim under the lease, but he may do so. The only claim submitted to arbitration here was that of the landlord, and the rule in the case of a voluntary submission applies.

The words of r. 14 in the Second Schedule to the Agricultural Holdings Act, 1908, are exactly copied from provision (*i*) of the First Schedule to the Arbitration Act, 1889, which by s. 2 is incorporated in every submission to arbitration under that Act. By deliberately choosing those words instead of the words in Order LXV., r. 1, or the Regulation of Railways Act, 1873, the Legislature showed that it intended the discretion given to the county court judge under the Agricultural Holdings Act, 1908, to be that of an arbitrator, not of a judge, and r. 15 clearly extends his powers. The claim of the landlord was the only question before the arbitrator, and the raising of it delayed for some time the payment of a much larger sum admittedly due to the tenant. The county court judge was justified in thinking that the conduct of the landlord in claiming a sum of which he recovered less than one-tenth was, under the circumstances, unreasonable.

*Disturnal, K.C.*, in reply.

LORD READING C.J., after stating the facts of the case as above, continued: The claim put forward by Lord Ashburton was for 744*l.*: all that he recovered was 71*l.*; yet the arbitrator took the very exceptional course of ordering him to pay the costs of the arbitration, except such costs as were incidental to the special case stated to the Court of Appeal, and with regard to those costs the arbitrator said that each party should bear his own.

On behalf of Lord Ashburton it is now said that the arbitrator had

(1) L. R. 5 C. P. 34. (2) (1879) 4 Q. B. D. 611.

no power to make such an order; that he was in no better position than a judge of the High Court, and that he was not in the same position as an arbitrator under the Arbitration Act of 1889, who may be described as an arbitrator under a voluntary arbitration; that the arbitrator was a tribunal appointed by Parliament under the Agricultural Holdings Act of 1908; that that Act provided that the tribunal should consist of an individual to be selected by the parties, or, if they failed to agree, to be nominated by the Board of Agriculture; and it is argued before us that in these circumstances there was no power in the arbitrator to do anything more than a judge could have done, and he ought to have exercised his discretion judicially as a judge must do, and within the limits of judicial discretion as laid down by the Courts; and that in no circumstances could a plaintiff, unless there was something amounting to misconduct or vexatious proceedings, be ordered to pay the whole of the costs of an action in which he had succeeded. It becomes important to consider the law, because I am satisfied that this Court can only interfere if it arrives at the conclusion that in the circumstances there was no material before the arbitrator upon which he could exercise his discretion in the way in which he has exercised it; in other words, that he has travelled outside his jurisdiction. If that is right, then his award can be set aside as an award made beyond the jurisdiction conferred upon him.

By the Second Schedule of the Agricultural Holdings Act of 1908 the rules are laid down as to the arbitration. Rule 14 is substantially in the same terms as the powers given to an arbitrator under the Arbitration Act of 1889, s. 2, whereby the costs are deemed to be in the discretion of the arbitrator, unless there is some provision to the contrary in the submission to arbitration. In my judgment those words placing the costs of the award in the discretion of the arbitrator carry us no further than the rules applicable to a judge of the High Court. Speaking generally costs are in the discretion of the judge, subject to a few exceptions. If we stopped at r. 14, there would in my judgment be no ground for distinguishing the case of an arbitrator under this Act from that of a judge of the High Court. But it is said that r. 15 has been deliberately inserted by Parliament in the schedule in order to give

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a greater power to the arbitrator under this Act than has been given to a judge of the High Court administering justice in these Courts. The only difficulty that has occurred to me in this case is with regard to the proper interpretation of the words in r. 15; but I have come to the conclusion that, reading rr. 14 and 15 together and bearing in mind the procedure under the Act, the intention was not to give the arbitrator the wide powers of an arbitrator under a voluntary arbitration, but to give to the tribunal constituted by this Act of Parliament the powers as to costs which are possessed by a judge. The object was not to fetter the discretion of the arbitrator, but to make it co-extensive with that of a judge, and in my view those who framed these rules must be taken to have had in mind the law stated by James L.J. in the case of *Dicks* v. *Yates* (1), quoted with approval by Brett L.J. in the case of *Foster* v. *Great Western Ry. Co.* (2): "A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there." Those words seem to me to state the law accurately, and the reason for it. In very exceptional cases a High Court judge would have power upon proper material before him to order a plaintiff, notwithstanding that he had succeeded, to pay the whole of the costs of the action, but in my view a High Court judge never would have the power to order a defendant to a successfully resisted claim to pay the whole of the costs of the action, for the reason pointed out by James L.J. and Brett L.J. But you may nevertheless make the person who invokes the assistance of the Court pay the costs notwithstanding that he is successful. In the one case the plaintiff comes to the Court and asks the assistance of the Court, and the Court has complete control. In the other case the defendant never wishes to be there, but is brought there at the summons of the King at the instance of the plaintiff.

Now that being the law, I think that there is this further observation to be made. As is pointed out in the case of *In re Fearon and Flinn* (3), there is a wider discretion given to the

(1) (1881) 18 Ch. D. 76, 85. (2) 8 Q. B. D. 515, 522.
(3) L. R. 5 C. P. 34.

arbitrator in a voluntary arbitration as to the costs, when full discretion is given to him to deal with the costs, than is conferred upon the High Court judge by the statutes and rules which have been referred to. In the case of *Foster* v. *Great Western Ry. Co.* (1) the Court in substance decided that the Railway Commissioners under the Regulation of Railways Act of 1873 were a statutory body created by the statute to deal with certain questions as arbitrators, in an arbitration tribunal created by Parliament, and therefore the discretion given to them as to costs was to be treated as a discretion of the judge, and the Court came to the conclusion that a prohibition ought to issue against the Railway Commissioners who had made a successful defendant pay part of the general costs. That was an application of the rule laid down in the case of *Dicks* v. *Yates*. (2)

In this case I have come to the conclusion that the Legislature by this statute of 1908 prevented the subject from having recourse in the ordinary way to the King's Courts; that is to say, the landlord could bring his claim for dilapidations against the tenant, but the tenant could not bring his claims under the Act against the landlord except under the arbitration proceedings, and if arbitration proceedings were commenced by the tenant, then the landlord could pursue his claim against the tenant in the same proceedings. Where Parliament has said that the sole tribunal to deal with these questions shall be an arbitration tribunal consisting of a single arbitrator, I think when the discretion is vested in that arbitrator it is not intended, unless you find language clearly expressing it, to give him a greater power than is given to a judge of the High Court over the costs. I am much impressed by the view taken by Ridley J. and Lord Coleridge J. in the Divisional Court, that they had no power to interfere because the discretion given to the arbitrator was absolute whether they agreed with him or not. But when the words "take into consideration the reasonableness or unreasonableness of the claim" were used in r. 15 it was not intended to do more than direct the attention of the arbitrator to matters which he must take into account in determining how the costs should be borne. It left him in the same position as a High Court judge, and he had the power to say that a plaintiff

(1) 8 Q. B. D. 515. (2) 18 Ch. D. 76.

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should pay all the costs, notwithstanding that he may have been to some extent successful, but only if there was material before him upon which he could exercise the discretion. If, as in the case of *Harris* v. *Petherick* (1), there had been a claim which could be regarded as merely vexatious, I think there would have been material upon which the arbitrator could have said it was an unreasonable claim within the meaning of r. 15, and if he came to that conclusion he could have ordered the successful plaintiff to pay the costs. But it has to be borne in mind that in *Harris* v. *Petherick* (1) there was a claim for 85*l.* on one issue and for 6*s.* on another issue. The case was tried twice, and the Court had ordered that the costs should abide the event of the trial. The plaintiff failed as to the 85*l.* claim and succeeded as to the claim for 6*s.* The Court decided that the plaintiff was not entitled to any costs in respect of that claim. The decision may be explained upon the ground that the Court thought the maxim "de minimis non curat lex" applied; the claim being vexatious in the sense of being so small that, taking into account the fact that no matter of principle was involved, the Court was entitled to say, and ought to say, that the plaintiff, notwithstanding that he had recovered the sum of 6*s.*, should nevertheless pay the whole of the costs of the action. On the whole, therefore, I arrive at the conclusion that there was no material upon which the arbitrator could exercise his discretion by making the plaintiff pay the whole of the costs of the litigation in which he had succeeded; and as he has acted without jurisdiction, this Court has power to intervene, and ought to intervene. For these reasons I think that the appeal should be allowed.

WARRINGTON L.J. I agree. This is an appeal from an order of the Divisional Court of the King's Bench Division refusing an application to set aside an award made by an arbitrator appointed under the Agricultural Holdings Act of 1908. The question we have to determine is this: whether the award was one which, under the circumstances, it was in the power of the arbitrator to make. The only question submitted to the arbitrator was as to the amount payable by the tenant to the landlord in respect of

(1) 4 Q. B. D. 611.

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dilapidations. I felt some doubt at one time whether the arbitration was really under the Agricultural Holdings Act at all, owing to the course which had been pursued before the matter actually came before the arbitrator and before the arbitrator was appointed; but those doubts have been removed, and I think we must treat the arbitration as one strictly under the Act, and the arbitrator as having the powers conferred by the Act and those alone, and not the powers which would be those of a conventional arbitrator, that is to say, one appointed in a private arbitration.

The landlord claimed as due to him in respect of dilapidations the sum of 744*l.* The arbitrator has awarded him the sum of 71*l.*, a substantial sum, but he has nevertheless ordered the landlord to pay all the costs of the proceedings before the arbitrator. I am not dealing now with the costs of the proceedings before the Court of Appeal and in reference to the special case. As to these he has made an order that each party shall bear his own costs. The point is that he has ordered the successful landlord—the man who has recovered a substantial sum—to pay the costs of the proceedings instituted and necessary for the purpose of recovering that sum.

Was that award within his power? I think there is no question that, if we were dealing with the order of a judge of the High Court, such an order would be reversed in this Court, not, be it remembered, on the ground that the Court of Appeal takes a different view as to the proper mode of exercising the judge's discretion as to costs, but on the ground that there were no materials before the judge on which he could exercise that discretion. It is said that the arbitrator under this Act has a power greater than that of a judge of the High Court, and that he can, in dealing with the question of costs, make an award which will be a valid award notwithstanding that there were no materials upon which he could make it. Now the power of the arbitrator with regard to the question of costs is conferred by two rules, rr. 14 and 15 in the Second Schedule to the Act. [His Lordship read those rules and continued:] I was at one time much impressed by r. 15 because it seemed to me at first sight that it gave to the arbitrator under this Act a power to do that which a judge of the High Court would not be entitled to do, namely, while giving effect to a legal claim,

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to consider whether or not that legal claim was reasonably or unreasonably made, and to deal with the question of costs accordingly, but on consideration I am satisfied that that is not so. I think a judge of the High Court has power to consider in dealing with the question of costs whether the claim is unreasonable or not. [His Lordship read the passage from the judgment of James L.J. in *Dicks* v. *Yates* (1) above set out, and continued :]

I think that the result is that the arbitrator has, under these rules, the same power over the costs of the arbitration as a judge of the High Court has over the proceedings before him, and no more; that means that he had no power to make the award which he made in this case unless there were materials justifying him in so doing. There were no such materials, and the result is, in my opinion, that the award was one which was not within his competency to make, and that the Divisional Court ought to have made, and this Court ought now to make, an order setting aside the award. The appeal therefore will be allowed.

LUSH J. This case raises a question which has an importance not at all to be measured by the amount in dispute between the parties. The contention of the respondent involves this proposition, that when the Legislature created this tribunal and compelled litigants in cases of this kind to resort to it they purposely invested the tribunal with power to act in a manner which has always been held to be unjudicial in respect to the awarding of costs. We were asked to say that the tribunal was not a compulsory tribunal, because by s. 13 of the Act the parties have the power to agree upon an arbitrator. They have no power to choose their forum. It is quite true that if they both agree they may select the particular arbitrator who is to act, but the forum is one to which they are compelled to resort. It is not one which under the Arbitration Act the parties agree to select. If the respondents are right, an arbitrator in an arbitration under the Agricultural Holdings Act of 1908 has power to do that which a judge of the High Court cannot do and which a judge of the county court cannot do. If they are

(1) 18 Ch. D. 76, 85.

right, an arbitrator may make a defendant, against whom a claim has been made which the arbitrator decides is without foundation, pay the whole of the costs of the arbitration. That is the converse case to this. It is quite true in this case it was the claimant, who had proved that he had a substantial claim, and who had recovered the sum of 71*l.*, whom the arbitrator ordered to pay the whole of the costs of the arbitration, but if the argument of the respondent is right the arbitrator could, in another case, saddle the successful defendant with the whole of the costs of the arbitration.

Now I think it is clear beyond controversy that a judge of the High Court or a judge of the county court would have no jurisdiction to make the order which the arbitrator made in this case, and it is equally clear that he would not have jurisdiction to order a successful defendant to pay the costs. It is perfectly true that there is this difference between the case of a plaintiff and the case of a defendant, that although the plaintiff succeeds he may be ordered to pay the whole of the costs, but that is only in cases where it is manifest that the action is one which ought never to have been brought and in which to all intents and purposes it is truly said that he was not successful. He may have been successful in form, but was not successful in substance.

The case of the respondent was put upon two grounds. First of all we were asked to say that the language of r. 14 of the Second Schedule to the Act is so wide in its terms as to put the whole of the costs of the arbitration in the discretion of the arbitrator, and no doubt the language of that r. 14 is very nearly identical with the language of the section in the Arbitration Act of 1889 which deals with the question of costs. But in substance it does not differ from the language used in s. 28 of the Regulation of Railways Act, 1873, or from the language used in s. 113 of the County Courts Act, 1888, because in both those enactments full and complete discretion over the question of costs was given, in the one case to the Railway Commissioners and in the other case to the judge of the county court, and yet it has been held, in the case of the Railway Commissioners in *Foster* v. *Great Western Ry. Co.* (1), that the wide terms of this discretion as to costs must be controlled by the same limitations which control the exercise of a discretion over

(1) 8 Q. B. D. 515.

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costs by a judge of this Court. And in the case of the county court judges it has been so held over and over again: see *Hudsons, Ld.* v. *De Halpert.* (1)

With regard to the Arbitration Act, 1889, I wish to point out that the Legislature does not say there that an arbitrator appointed under a submission to arbitration has power to deal with the costs. What it does say is that, unless the contrary appears, a submission shall be deemed to include that power, and it may well be—and I will assume it to be the case—that where the parties choose their own forum and select their own arbitrator, they choose that forum on the very basis that he is not to act judicially, bound by all the strict rules that bind a judge of the High Court, but to decide their disputes as a layman, and they take him for better or for worse. I do not see, therefore, how any argument at all can be drawn from the identical language used in this Act and in the Arbitration Act, because, as I have said, in this Act it is not the parties who choose their forum, but it is the forum which the Legislature has clothed with powers to deal with these disputes.

Then we come to r. 15 of the Second Schedule, which no doubt does create, at first sight, a difficulty. It seems to me that when one looks at the language of r. 15 it is impossible to draw from it the inference that the Legislature intended an arbitrator under this Act to act in the way which is contended for by the respondent. What that rule does say is this: that in awarding costs the arbitrator shall take into consideration the reasonableness or unreasonableness of the claim, and so on, and generally all the circumstances of the case, and goes on to say that he may disallow costs in certain cases. The meaning of that rule to my mind is this: It gives an arbitrator directions as to what circumstances he is to take into account in giving his award with regard to the costs, but it leaves him in exactly the position he was in under r. 14. He has to deal judicially with the costs, and I think that it is quite impossible to extract from that r. 14 the conclusion that the arbitrator, to whom the litigants are bound to resort, was intended to act in total disregard of legal principles and to allow costs according to his caprice or according to arbitrary opinions of what he thinks to be fair. He has, therefore, in this case made an award which

(1) (1913) 108 L. T. 416.

cannot legally be made, and he has exceeded his jurisdiction in making it, and on those grounds I think the award should be set aside.

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Solicitor for appellant: *H. S. Knight-Gregson.*

Solicitors for respondent: *Church, Adams & Prior, for P. W. Snelling, Winchester.*

J. R. B.

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[IN THE COURT OF APPEAL.]

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## CAPEL *v.* SOULIDI.

*Charterparty—Construction—"Commandeer."*

The owner of a Greek ship chartered her to the plaintiffs under a charterparty which provided that if she should be "commandeered" by the Greek Government the charterparty should be cancelled. While the ship was lying at Marseilles discharging coal for the charterers, the Greek Government on September 25, 1915, sent an order to the captain requiring him to proceed at once to Piræus for the purpose of placing the ship at their disposal if they should desire to use it. On October 11, while the ship was still at Marseilles, the Greek Government withdrew their order and released the ship:—

*Held*, that the ship had been "commandeered" and that the charterparty was cancelled.

Decision of Atkin J. [1916] 1 K. B. 439 affirmed.

By a charterparty dated May 6, 1915, the defendant, the owner of the Greek steamer *Kardamila*, chartered her for twelve months to the plaintiffs, who were coal merchants at Cardiff, at 2300*l.* a month, to carry certain cargoes within the limits of the west coast of the United Kingdom, France not east of Calais, Portugal, Spain, and the Mediterranean not east of Sicily. The charterparty contained the following clause: "32. Should steamer be commandeered by the Greek Government this charter shall be cancelled." The ship was employed by the plaintiffs to carry coal to Marseilles. On September 25, 1915, when she was in Marseilles Harbour discharging coal, a notice in Greek was served upon the captain by the Greek Consul-General at Marseilles, and signed by him, of which the following is a translation:—"I beg to advise you that pursuant to the telegraphic orders of the Royal Greek Government all Greek steamers

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in the harbour of Marseilles in ballast or loaded with coal or grain must proceed immediately to Piræus, and the steamers loaded with other cargoes to discharge with all speed and sail immediately for Piræus. In informing you of the above order of the Royal Greek Government I beg you to strictly and without fail conform to same and acknowledge receipt." On September 27 the defendant wrote to the plaintiffs: "I hereby beg to formally notify you that the s.s. *Kardamila* having been commandeered by the Greek Government the charterparty of the 6th May last is cancelled pursuant to clause 32." The defendant desired that the ship, which had some time before suffered damage from a collision, should be thoroughly repaired before proceeding to Piræus, for fear that if she went there unrepaired she might lose her class. He also wished the repairs to be done at Cardiff. He therefore entered into negotiations with the Greek Government through the Consul-General to get permission to finish discharging his cargo and have the ship repaired. On October 11, while the ship was still lying at Marseilles, the Greek Government withdrew their order of September 25 and released the ship. She having already discharged her cargo returned to Cardiff. The ship was supplied with ballast and water for the voyage at the cost of the plaintiffs, the charterers. Freights had in the meantime risen considerably above the rate reserved in the charterparty, and the defendant contended that the ship had been "commandeered" within the meaning of the charterparty.

Atkin J. gave judgment for the defendant, and the plaintiffs appealed.

*Sir Robert Finlay, K.C.*, *MacKinnon, K.C.*, and *Raeburn*, for the appellants. On the facts in this case there was nothing to cancel the charterparty. To commandeer must mean to seize or appropriate for the use of the Government. Here the Greek Government never seized or appropriated the ship at all. They only gave a notice for the ship to proceed to Piræus. On its arrival they would have had to decide whether they would commandeer it or not. This notice was withdrawn before anything was done under it. It is clear the parties did not consider the charterparty at an end, for the ship was supplied with water and ballast at the cost of the charterers.

*Roche, K.C.*, and *C. R. Dunlop*, for the respondent. The Greek Government took control of the ship from the date of the notice to the date of the release. The captain had to wire to that Government for leave to continue discharging the ship and to negotiate for her release in order that he might take her to Cardiff for repairs. The notice compelled the ship to be idle for sixteen days, an important matter, as she was chartered at 2300*l.* a month.

*Sir Robert Finlay, K.C.*, in reply.

LORD READING C.J. This is an appeal from Atkin J., who tried the case without a jury and gave judgment for the defendant. [His Lordship stated the facts of the case as above and proceeded :] In the events that happened it is alleged by the shipowner that commandeering did happen, and consequently that the charterparty was cancelled The charterers say that there was no commandeering, or that if there was, it was not such a commandeering of the vessel as was provided for in clause 32, and consequently that the charterparty was not cancelled. The question we have to determine is whether the event mentioned in clause 32 has happened.

To my mind the facts of this case are of the utmost importance because on the conclusion at which I have arrived the facts dispose of this case without giving rise to the various difficulties which have been suggested by Sir Robert Finlay and Mr. MacKinnon in their arguments on behalf of the appellants.

According to the evidence given by a Greek lawyer in this country, the effect of that document was to place the vessel under the orders of the Greek Government and to bring those who were on board, and were Greek subjects, under the orders of the Greek Government, as if they belonged to the Greek navy. They were to consider that that notice applied to them as if they were in that navy. As I understand the arguments, it is not suggested that that cannot be the effect of the order, but what is said is that the order never became effective, and consequently the commandeering was never an effective commandeering.

It is clear that a notice of this kind may be sufficient to constitute commandeering within the meaning of the clause, if in truth that which follows shows that this notice was effective, and that the

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vessel was brought under the control, or, as it has been said during the latter part of the argument, taken to the use, of the Greek Government. In my judgment the suspension of the order, which, it is suggested, took place between September 25 and October 11, never in fact took place. There were negotiations proceeding to enable the shipowner to send his vessel to England for the purpose of repairs being executed before the vessel proceeded on voyages for the Greek Government. But the correspondence shows that the owner of the vessel was desirous that the Greek Government should understand that he was sailing his vessel under seaworthy certificates, and that, in order to enable him to do what the Greek Government required, his vessel must be put into a perfectly seaworthy condition, which necessitated his bringing the ship to England. Therefore he asked permission to do this, and negotiations went on for some time. Before he got this permission the Greek Government on October 11 changed its view with regard to this vessel and set her free. She then proceeded on October 13 to Cardiff, where she was repaired.

During the time that elapsed between September 25 and October 11, I am of opinion upon these facts as found by the learned judge that this vessel was under the control of the Greek Government, and that she was actually being used by the Greek Government in that one sense, although, to my mind, it is by no means necessary to say that she was actually being used in the sense of having to proceed on a voyage for the Greek Government in order to bring her within this clause. If she once came under the control of the Greek Government, she was commandeered by the Greek Government and effectively commandeered, having regard to the facts of the case.

I can see very difficult problems which might arise if the facts warranted the hypothesis upon which Sir Robert Finlay argued the case. But, in my judgment, in this case we have no such difficulties, because there was a clear and, in my opinion, effective commandeering until the release took place, which was some fifteen or sixteen days after. In fact, when one considers what was happening, it seems beyond question that this was the kind of commandeering intended to be covered by clause 32, because the charterers were paying 2300*l.* a month for the use of the vessel and stipulating

that in the event of the Greek Government taking control of the vessel the charter should be cancelled. If this clause does not apply the consequence would be that during fifteen or sixteen days that the vessel was kept at Marseilles under the orders and because of the orders of the Greek Government the money would have had to be paid, notwithstanding that the Greek Government had taken control, because the charter would have been running all the time.

I have come to the conclusion that there was no difficulty in this case owing to the facts, and that Atkin J.'s judgment was right and that the appeal must be dismissed.

WARRINGTON L.J. I agree. It is not necessary to consider the puzzling questions which have been suggested in argument in this case and which might arise in other cases. Here the captain and crew of the ship became members of the Greek navy by virtue of the order. The order was effective as soon as it was made and was accepted by the owner. But he asked that he might be allowed to effect some necessary repairs before sailing for Greece. The question is whether compliance by the Greek Government with this request effected a reversal of the order. In my opinion it clearly did not. It is impossible to say the ship was not commandeered.

LUSH J. I agree. Service of a notice that a ship will be commandeered does not necessarily amount to commandeering her. But in this case the facts show that the Greek Government had the ship under their control from the date of the notice, and therefore, in my opinion, it was commandeered from that date.

Solicitors for appellants: *Stokes & Stokes, for Lloyd & Pratt, Cardiff.*

Solicitors for respondent: *Downing, Handcock, Middleton & Lewis.*

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[IN THE COURT OF APPEAL.]

## HEATH'S GARAGE, LIMITED *v.* HODGES.

*Nuisance—Highway—Sheep straying on Highway—Damage to Vehicle using Highway.*

An owner or occupier of land adjoining an ordinary highway is not bound to fence it so as to prevent harmless animals like sheep from straying upon the highway.

Although under the Highway Acts, 1836 and 1864, the owner of cattle found straying upon the highway is liable to certain penalties, he is not thereby rendered liable to an action at law.

While the plaintiffs' motor car was being driven upon a highway in the daylight at a rate of from sixteen to twenty miles an hour, the driver saw in front of him on the road a number of sheep unattended; he put on his brakes, and almost immediately thereafter two sheep, which had apparently been left behind by the others, jumped from a bank on the side of the road, and one of them ran into the car and caused it to be overturned and damaged. The sheep belonged to the defendant, who was subsequently prosecuted and fined under s. 25 of the Highway Act, 1864, for having allowed them to stray on the highway. In an action for damages in the county court the judge found that the sheep escaped on to the highway from the defendant's field through gaps in a defective hedge; that it was the natural tendency of sheep which were untended to run across or otherwise endanger vehicles in the road; that it was a matter of common knowledge that when sheep find themselves separated from the bulk of the flock they have almost a mania for rejoining it, perfectly regardless of intervening traffic; that the defendant had been guilty of negligence, or had committed a nuisance, in allowing the sheep to stray on to the highway; and that the accident was the natural consequence thereof. He accordingly gave judgment for the plaintiffs. His decision was reversed by the Divisional Court (Avory and Lush JJ.) on the ground that even assuming there was evidence of negligence or of a nuisance committed by the defendant in allowing the sheep to stray on to the highway, yet, there being no evidence of "a vicious or mischievous propensity" on the part of the sheep within the meaning of the decided cases, the accident was not the direct and natural consequence of such negligence or nuisance. The plaintiffs appealed:—

*Held*, affirming the decision of the Divisional Court [1916] 1 K. B. 206, that the defendant was under no duty to the plaintiffs as

members of the public using the road to keep his sheep from straying upon it, and that the accident was not the direct and natural consequence of the breach of any such duty.

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APPEAL from the decision of a Divisional Court (Avory J. and Lush J.) reversing the decision of the county court judge of Warwickshire, who gave judgment for the plaintiffs for 100*l*.

The facts, which are stated in the report of the case in the Court below (1), were shortly as follows :—

The plaintiffs, the owner and hirer of a motor car, sued the defendant for damage to the car caused, as they alleged, by the negligence of the defendant in allowing his sheep to escape from his field on to the adjoining highway, where some of them came into collision with the car, which was being driven in daylight at the rate of about sixteen miles an hour. The defendant was subsequently prosecuted and fined under s. 25 of the Highway Act, 1864, for having allowed his sheep to stray on the highway. The county court judge found, inter alia, that the hedge which separated the defendant's field from the highway had several large gaps in it and was inadequate to prevent sheep from passing through on to the highway, and that both as a question of fact and of law it was the natural tendency of sheep which were untended (as these sheep were) to run across or otherwise endanger vehicles in a road. He further held that owners and occupiers of land adjoining an ordinary highway were under a duty to keep their animals from being or lying thereon otherwise than in the exercise of the right of passage so as to make it less safe or commodious for the public ; that the defendant had committed a breach of duty by placing the sheep in a field inadequately fenced from the highway ; that it was the natural consequence of this that the sheep escaped on to the highway and caused danger to the traffic thereon ; and that as a natural consequence of such escape the accident was caused to the plaintiffs' car and particular damage thereby caused to them. He gave judgment for the plaintiffs for 100*l*. The Divisional Court held that even assuming there was evidence of negligence or of a nuisance committed by the defendant in allowing the sheep to stray on to the highway, yet, there being no evidence of " a vicious or mischievous propensity " on the part of the sheep within the meaning of the

(1) [1916] 1 K. B. 206.

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authorities, the accident was not the direct and natural consequence of such negligence or nuisance. They therefore reversed the decision of the county court judge and directed that judgment should be entered for the defendant.

The plaintiffs appealed.

*J. B. Matthews, K.C.*, and *Dawson Sadler*, for the appellants. The judgment of the county court judge was right both in law and in fact. The Court will not interfere with his finding of fact as to the natural tendency of sheep on a highway to get into the way of traffic. He was entitled to rely on his common knowledge as to that. The Divisional Court relied upon *Cox* v. *Burbidge* (1), but that case depended upon scienter and does not apply to a case like the present. Moreover, this Court is not bound by the decision in that case. In *Harris* v. *Mobbs* (2) the defendant had left a house van attached to a steam plough upon the grassy side of a highway, and he was held liable in damages under Lord Campbell's Act in an action by the executors of a man whose horse took fright at the obstruction and by kicking caused the death of the deceased. Denman J. there said: "I think it follows from cases which have been decided, that if there be an act done upon any part of the highway which is not a part of the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an action will lie for such damage." That is a clear and accurate statement of the law. See also *Wilkins* v. *Day*. (3) No doubt the plaintiff, to entitle him to maintain the action, must show that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial: *Benjamin* v. *Storr*. (4) It is submitted that the plaintiffs have discharged that onus in this case. In *Higgins* v. *Searle* (5) the jury found there was no negligence on the part of the defendant, and that case is no authority against the present plaintiffs. In *Hadwell* v. *Righton* (6), where a fowl which was on a highway, being frightened by a dog, flew into the plaintiff's bicycle, causing it to upset, whereby the plaintiff was injured, the

(1) (1863) 13 C. B. (N.S.) 430.
(2) (1878) 3 Ex. D. 268.
(3) (1883) 12 Q. B. D. 110.
(4) (1874) L. R. 9 C. P. 400.
(5) (1909) 100 L. T. 280.
(6) [1907] 2 K. B. 345.

owner of the fowl was held not liable, on the ground that the damage was not the natural consequence of the fowl's being upon the highway. That is not this case. In *Ellis* v. *Banyard* (1) Vaughan Williams L.J. expressed the opinion that owners of cattle must see that the highway is not obstructed or rendered dangerous by their cattle. In *Jones* v. *Lee* (2) the damage was regarded as the result of a vicious attack by a horse which was not to be expected. In this case there was a breach by the defendant of a statutory duty followed by damage: Highway Act, 1835, s. 74; Highway Act, 1864, s. 25. Such a breach gives the plaintiffs a right of action which is not taken away by reason of the imposition of a statutory penalty: *Groves* v. *Lord Wimborne* (3); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (4) The sections of the Highway Acts were intended to protect the public, and there is nothing in those Acts to show that there is no cause of action. Where there is breach of a statutory duty it is not necessary to prove negligence. The appellants have suffered direct damage and are entitled to recover.

*Joy*, for the respondent. It is said that the Court will not interfere with the findings of fact by the county court judge; but the conclusion to be drawn by inference from the facts is a question of law. Where the facts are ascertained the legal extent of the inference to be drawn from them is a question of law. In this case the governing principle is that a person is liable only for the actual and probable consequences following from trespass or negligence, and unless the injury suffered can be brought within that degree there is no cause of action against him: *Bradley* v. *Wallaces, Ld.* (5); *Metropolitan Ry. Co.* v. *Jackson.* (6) This cannot be said to be a case of "vicious or mischievous propensity" on the part of the sheep. The stupidity of the animal gives no right of action against the owner. It is not the case of an animal untended by its owner and doing damage in accordance with its known propensity. There must be either trespass or negligence: *Freestone* v. *Casswell* (7); Hawkins's Pleas of the Crown, 8th ed., vol. 1, book 1, cap. 32, s. 10, p. 700; *Dovaston* v. *Payne.* (8) In dealing with a case relating to

(1) (1911) 106 L. T. 51.
(2) (1911) 106 L. T. 123.
(3) [1898] 2 Q. B. 402.
(4) (1877) 2 Ex. D. 441.
(5) [1913] 3 K. B. 629.
(6) (1877) 3 App. Cas. 193.
(7) (1869) L. R. 4 Q. B. 519.
(8) (1795) 2 H. Bl. 527.

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damage caused by animals of this kind there is no principle which renders the owner liable for the results of their timidity or stupidity: *Ellis* v. *Banyard*. (1)

[LORD COZENS-HARDY M.R. referred to *Davies* v. *Mann*. (2)]

To allow this appeal would be to hold that *Ellis* v. *Banyard* (1) was wrongly decided. There is no obligation on the owner or occupier of land adjoining a highway so to fence it as to prevent cattle from getting on to the highway: *Jones* v. *Lee*. (3) The mere presence in the road of animals in the harmless category which cause damage by acting stupidly but not viciously does not give rise to a cause of action against their owner: *Higgins* v. *Searle* (4); *Hudson* v. *Roberts*. (5) In *Hadwell* v. *Righton* (6) the owner of the fowl was held not liable as the damage was not the natural consequence of its presence on the highway. Assuming that negligence is relevant, there is no evidence of negligence here. It is said there was negligence in allowing the sheep to be in a field with gaps in the hedge, but there is no evidence that the defendant knew or ought to have known of this.

No case can be made against the respondent under the Highway Acts. In *Groves* v. *Lord Wimborne* (7) the Act was intended to secure the safety of persons using machinery. The Highway Acts were not passed to secure the safety of persons using the highway. Those Acts have no bearing on the present case. A breach of a statutory duty does not constitute the foundation for a right of action: *Ward* v. *Hobbs* (8); *Pursell* v. *Clement Talbot, Ld.* (9) In *Saunders* v. *Holborn District Board of Works* (10) it was held that s. 29 of the Public Health (London) Act, 1891, which imposes the duty of removing street refuse, does not give any right of action to a person suffering special damage from a breach by the sanitary authority of such duty.

*J. B. Matthews, K.C.*, in reply. There is no case for upsetting the judgment of the county court judge on what, it is submitted, is a question of fact. A person who has suffered special damage through the breach by another of a statutory duty is entitled to

(1) 106 L. T. 51.
(2) (1842) 10 M. & W. 546.
(3) 106 L. T. 123.
(4) 100 L. T. 280.
(5) (1851) 6 Ex. 697.
(6) [1907] 2 K. B. 345.
(7) [1898] 2 Q. B. 402.
(8) (1878) 4 App. Cas. 13, 23.
(9) (1914) 111 L. T. 827.
(10) [1895] 1 Q. B. 64.

recover in a civil action : *Couch* v. *Steel* (1) ; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2) ; *Groves* v. *Lord Wimborne* (3) ; *David* v. *Britannic Merthyr Coal Co.* (4) ; *Watkins* v. *Naval Colliery Co.* (5) ; *Butler* v. *Fife Coal Co.* (6)

*Cur. adv. vult*

June 3. LORD COZENS-HARDY M.R. This appeal raises a curious and important question of law. The plaintiffs sued in the county court for damage to a motor car caused by the negligence of the defendant in the following circumstances : While the car was being driven along a highway in the daylight, at a speed which is not found to have been excessive, the driver saw in front of him some sheep unattended. He put on his brakes, and almost immediately thereafter a sheep jumped from the bank, and in some way ran into the car and broke part of the steering apparatus. The car was overturned and substantially damaged. The learned county court judge found that the sheep escaped on to the highway from an adjoining field in the occupation of the defendant in which the rest of the flock still remained. They escaped through some gaps in the hedge. He held that it was the duty of the defendant to keep his sheep from being on the highway, except for the purpose of passing along the highway, and he gave judgment for the plaintiffs for 100*l*. The Divisional Court allowed the appeal. The first question to be considered is what is the duty of the owner and occupier of land adjoining a highway. Is he bound to maintain a hedge or fence for the purpose of preventing sheep from straying on to the highway ? I put aside the case where either by the provisions of a local Inclosure Act, or by prescription, or otherwise, a duty to fence is imposed, and I treat the highway on which the accident occurred as an ordinary highway. It is somewhat remarkable that there is no direct decision on this point, but there are dicta which have to be considered. In *Goodwyn* v. *Cheveley* (7) Bramwell B. said " A person is not bound to fence his land," and Pollock C.B. agreed. In *Jones* v. *Lee* (8) Bankes J. said :

(1) (1854) 3 E. & B. 402.
(2) 2 Ex. D. 441.
(3) [1898] 2 Q. B. 402.
(4) [1909] 2 K. B. 146.
(5) [1912] A. C. 693.
(6) [1912] A. C. 149.
(7) (1859) 4 H. & N. 631, 634.
(8) 106 L. T. 123.

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"First of all, what is the duty of an owner or occupier of land adjoining a highway with regard to keeping animals off the highway or fencing his land so as to prevent animals getting on to the highway? By common law there is no such duty at all, and we have not to-day heard any argument as to whether any duty can be created under the Highway Act. I am not going to consider that for the purpose of my judgment. Suffice it to say by common law the owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highway. The plaintiffs therefore in this case seem to me to fail in establishing the first point which it is necessary to establish—namely, any duty as between the owner of this animal and themselves." In *Ellis* v. *Banyard* (1) Buckley L.J. expressly approved this doctrine, and Kennedy L.J., though not so strongly, took the same view. Vaughan Williams L.J. on the other hand, dissented; at least if the sheep or cattle were so numerous as to obstruct the highway. And this Court in *Higgins* v. *Searle* (2) (the sow case) indicated their approval of the doctrine laid down by Bankes J. I am prepared to hold that in ordinary circumstances, in an ordinary highway, it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and that it makes no difference whether the action is sought to be based on negligence or on a nuisance to the highway. An animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor car, and the owner of the sheep cannot be held liable on that footing. The reasoning of the Court of Common Pleas in the leading case of *Cox* v. *Burbidge* (3) seems to me to cover the present case. I do not forget that under the Highway Acts of 1835 and 1864 certain penalties may be imposed upon any one whose cattle are found straying on the road. That was a new remedy given for the protection of the public, but I do not think it is a case in which the man whose cattle have strayed renders himself liable to an action at law. The fine imposed by the justices is the only remedy available. It was conceded by counsel that there is no trace of any duty having been established against the occupier of land adjacent to a highway towards a member of the public such as the appellants assert to exist. This is a strong

(1) 106 L. T. 51, 53. (2) 100 L. T. 280.
(3) 13 C. B. (N.S.) 430.

argument that no such duty exists. In the course of centuries the straying of sheep and other harmless domestic animals on the highway must have been common, yet there is no trace of any indictment for a nuisance by permitting cattle to stray. Nothing that I have said will affect the right of the owner of the soil of the highway to recover damages, if any, by sheep using the road not for the purpose of a highway. He would be in the same position as the owner of any land not being a highway into which the sheep entered. The appeal must be dismissed with costs.

PICKFORD L.J. This was an appeal from a judgment of a Divisional Court (Avory and Lush JJ.) which reversed a judgment of the county court judge of Warwickshire. The action was brought by the owner and hirer of a motor car which was damaged under the following circumstances. The car was being driven along a highway near Kenilworth when the driver saw some sheep untended ahead of him in the road. He put on his brakes, but almost immediately two sheep which he had not seen jumped from the bank near him, and one ran into the car and caused an accident from which the damage claimed resulted. I agree with Lush J. that the judgment of the county court judge should be treated as a finding that the defendant was negligent in not keeping his sheep from straying, and that the driver of the motor car was not negligent. He also found, and I think there was evidence to support the finding, that it is the natural tendency of sheep to run across or otherwise endanger vehicles passing along the highway on which they are straying, and also that if some get separated from the flock they have what he calls almost a mania for rejoining it regardless of obstacles. I cannot find any evidence specifically supporting this second finding, and I shall confine myself in dealing with the case to the former finding as to the tendency of sheep. I do not take it as a finding that sheep always behave in that way, but that it is their nature to do so at times. Any one dealing with sheep would therefore be presumed to know it. There is no finding or evidence that there was any vicious or wild tendency to run into vehicles in these particular sheep. The question therefore seems to be distinctly raised: Is the owner of domesticated animals which he negligently allows to stray on a highway liable for damage

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occasioned by their obstructing a vehicle on the highway by reason of an action which is a natural and ordinary action of an animal of that kind ? The learned county court judge held that the defendant was liable, and the Divisional Court reversed that decision and entered judgment for the defendant. The learned judges did not put their judgments quite on the same ground, Avory J. holding that the case was governed by *Cox* v. *Burbidge* (1), and Lush J. that the damage was too remote and not the natural consequence of the negligence. Both learned judges laid some stress upon the speed of the motor car, but, with respect, I cannot see how that is relevant if the finding of the county court judge that there was no negligence—i.e., no want of reasonable precaution to avoid danger on the part of the driver—be accepted. The pace at which motor cars are driven on roads where cattle are or may be expected to be straying is often evidence, and strong evidence, of such want of precaution, but as that is negatived in this case, the speed seems to me to be immaterial. If there be no obligation to restrain animals from so obstructing vehicles, the introduction of fast traffic cannot create one, and on the other hand, if there be such an obligation, the introduction of fast traffic cannot do away with it, although it makes the consequences more serious, and the obligation in that way more onerous. I confess to a difficulty in seeing the distinction in principle between the two cases mentioned by Lush J. of a sheep obstructing a vehicle in the dark and one obstructing a vehicle in daylight if it be once found that the driver of that vehicle was taking proper precautions to avoid accidents. I have great doubts whether this case is governed by *Cox* v. *Burbidge*. (1) That case decided that the owner of an animal straying on a highway was not responsible for damage occasioned to a person using the highway where such damage was occasioned by a vicious act of that animal inconsistent with the usual nature of such animals. In my opinion it left entirely untouched the question whether he would be liable if the damage was caused by an obstruction to the highway resulting from an action of the animal in accordance with the nature of such domesticated animals. The learned judges in that case said that the law of highways had nothing to do with the case because it was no more to be expected that the animal would

(1) 13 C. B. (N.S.) 430, 441.

commit a vicious act on a highway than anywhere else: see per Willes J.

The suggestion that the driver might be indictable looks a little the other way, for I do not think Willes J. meant to say that damage resulting from an indictable nuisance could not give rise to an action, but it is only a suggestion of a possibility, and I do not think it is of importance, except as showing that the case was not meant to decide this point, and that the basis of the decision was that the act was a vicious act not natural to the class of animals and not known to the owner to be likely to occur in the case of that particular animal. I think that *Jones* v. *Lee* (1), so far as this point is concerned, proceeds on the same ground, as both learned judges seemed to consider the act of the horse in that case a vicious act not natural to a horse. *Bradley* v. *Wallaces, Ld.* (2) turns on the same point, and in *Hadwell* v. *Righton* (3) the damage was caused not by the natural tendency of the hen, but by its being frightened and driven towards the bicycle by a dog. It may well be that it is not the natural consequence of letting a hen stray that there will be a dog there and a passing bicycle at the same time, and that the one will chase the hen into the other. The cases which seem to me important are *Jones* v. *Lee* (1), so far as the dictum of Bankes J. is concerned, *Higgins* v. *Searle* (4), and *Ellis* v. *Banyard.* (5) In the last case Buckley L.J. laid down the same doctrine as Bankes J., and I take that to go to this extent: that there is no obligation to fence so as to keep animals from straying upon a highway, and therefore no liability in respect of them if they do so, no matter how inevitable and how great the obstruction they cause. This seems to me to be in direct contradiction to the opinions expressed by the majority of the Court of Appeal in *Ellis* v. *Banyard.* (5) I do not think it is necessary in this case to decide which is the right view, as I think that *Higgins* v. *Searle* (4) and *Ellis* v. *Banyard* (5) are expressions of opinion in this Court that the owner of an animal is not responsible under the circumstances of this case. It is true that in both those cases the Court held that there was no evidence of negligence, and the appellants' counsel therefore argued that we

(1) 106 L. T. 123.
(2) [1913] 3 K. B. 629.
(3) [1907] 2 K. B. 345.
(4) 100 L. T. 280.
(5) 106 L. T. 51.

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should disregard any expressions of opinion beyond that. I do not think that is right: the Court proceeded to deal with the case on the assumption that there was negligence, and, although that part of the judgment was not necessary to support the decision, I do not think we can disregard it.

In *Higgins* v. *Searle* (1) the damage was caused by a sow, which had strayed on to a highway and was lying down, getting up suddenly when the driver of a motor car sounded its horn, which made a horse, also on the road, shy into the motor car and occasion damage. It might have been said that the combination of sow, horse, and motor at the same time could not have been anticipated any more than the combination of dog, hen, and bicycle in *Hadwell* v. *Righton* (2); but the case was not decided on that ground. It was found by the jury that the shying of the horse was the probable result of the action of the sow and that there was no peculiarity about this sow which differentiated it in its action or otherwise from other sows. To place an inanimate object upon a highway so as to cause a horse to shy was held to be actionable in *Harris* v. *Mobbs* (3), and it was argued in *Higgins* v. *Searle* (1) that to allow an animal to stray on to a highway and so cause a horse to shy was in the same measure actionable where what the animal did was only what it might be expected that such an animal might do. In *Ellis* v. *Banyard* (4) the damage was occasioned by the natural act of some cattle in obstructing the road, and again the Court held that there was no evidence of negligence, but Buckley L.J. and Kennedy L.J. expressed opinions that, even if it had been proved, there would have been no liability. It seems to me that the result of these two cases is that, although to place an inanimate object so as to be an obstruction to a highway is actionable if damage results, to allow to stray on a highway an animal which becomes an obstruction by an act of its own, even though one natural to such an animal, is not. This, however, is qualified by Vaughan Williams and Kennedy L.JJ. to the extent that if the animals are allowed to stray in such large numbers as inevitably to be an obstruction an action will lie. The ground of the distinction is not very specifically expressed, but perhaps it is that, although the

(1) 100 L. T. 280.
(2) [1907] 2 K. B. 345.
(3) 3 Ex. D. 268.
(4) 106 L. T. 51.

animal may probably so act as to cause an obstruction, it will not necessarily do so, and whether it so acts or not depends upon its own will, and that therefore the owner cannot expect an obstruction to be the natural consequence of its straying, whereas in the case of large numbers the obstruction is inevitable merely by reason of the numbers. Otherwise it is difficult to see, if there is liability for an obstruction, how there is any difference between its being caused by many or by few. In the case of an inanimate object it is placed where it is by the owner and there is no question as to whether it will become an obstruction or not. But, whatever the reasons, I think that those cases show that, according to the opinions expressed in this Court in the more recent cases, the defendant is not liable here. It was also argued that the defendant had been guilty of a breach of the Highway Act and therefore he was liable. That must, I think, depend upon whether, looking at the whole of the Act, it intended to confer a right of action, and I do not think it did. I think the appeal must be dismissed.

NEVILLE J. Sheep having been put in a field, which adjoined a public highway and was separated from it by a fence in which there were gaps, some of them escaped into the road. One of these sheep, frightened by a passing motor car, rushed across the road and, colliding with the car, caused it to swerve. An accident resulted with damage to the car. The question is whether the owner of the car is entitled to recover damages from the owner of the sheep. This depends upon two things—first, was the defendant under a duty to the plaintiff, as a member of the public using the road, to keep his sheep from straying on the road, and, secondly, was the accident and consequent damage the natural result of the failure to perform the duty? If the duty exists, negligence has been found, and in that case the only remaining question is, was the damage too remote? We are now in the year 1916, and during the preceding centuries no such duty has ever been established against the occupier of land adjacent to a highway. It was suggested in argument that that might be accounted for by the rarity of the occurrence of accidents of the nature of the one in question. If this is so, it may have an important bearing on the second question in the case. It was conceded that no such duty exists where a road runs across

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open land, but this is sought to be explained on the ground that in such cases the road must be presumed to have been dedicated subject to the risk of cattle being upon it. This explanation does not appear to me satisfactory, inasmuch as, in the case of fenced roads, many if not most of them must have been dedicated before they were fenced, and it seems to me impossible to hold that, by subsequently fencing, the adjoining owner made any further dedication or in any way enlarged the rights of the public using the road against him. Even in the case of fenced roads grazing rights by the wayside have always been recognized; cottagers have been in the habit of allowing their animals the benefit of the pasturage with no fear before their eyes greater than that of the pound. No single instance has been or, I believe, can be produced of any one having been indicted for nuisance by permitting cattle to stray upon the road. No case has ever established liability in civil Courts, and the strongest authority that can be produced for the proposition is a dictum of a learned judge that such an action might possibly lie, while it seems to me there is a great body of judicial opinion against it, including that of Vaughan Williams L.J., Buckley L.J., Kennedy L.J., Bankes L.J., Fletcher Moulton L.J., and others.

In my opinion the experience of centuries has shown that the presence of domestic animals upon the highway is not inconsistent with the reasonable safety of the public using the road. I am unable to draw any distinction in this regard between domestic animals. I think horses, cattle, sheep, pigs, fowls, and dogs all fall into the same category for this purpose. There is no doubt that the advent of motor cars has greatly increased the danger resulting from the presence of loose animals on the road owing to the speed at which the cars travel and the difficulty shared by man and beast of avoiding them. It was only yesterday, however, that, as mechanically propelled carriages, the right of motor cars to use the roads was subject to conditions which rendered great speed unattainable, and I think that to-day those who use them must take the roads as they find them and put up themselves with such risks as the speed of their cars occasions not only to themselves but to others. The prima facie harmlessness of domestic animals as frequenters of the highway is, I think, established as a legal doctrine. As

Blackburn J. said in *Fletcher* v. *Rylands* (1), "our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore." If he had added "and that domestic animals of normal character do not by straying on the road obstruct traffic" it would have been an accurate statement and, at that date, free from the suspicion of irony which attaches to the statement which he did make, and which might attach to the suggested addition to his pronouncement were it made to-day. It seems to me impossible to suppose that the question whether domestic animals are dangerous or harmless by the wayside, where they have ever been common objects, can have been one to be left to the jury, for that would have been to leave the character of domestic animals indeterminate for all time. There can be little doubt, I think, that our ancestors showed true wisdom in the conclusion they arrived at in this respect. The instinct of the normal animal is to fear man and to endeavour to avoid danger, and in the days when roads were bad and traffic slow their capacity was sufficient to enable them to do so. As roads improved and the pace of traffic increased it was thought that certain measures of protection for the roads against straying animals were desirable, and these were afforded by the provisions of the Highway Acts of 1835 and 1864. If the character of domestic animals with regard to highways had come to be considered for the first time when roads were tarred and motor traffic abounded, it is possible that a different view might have prevailed with regard to their harmlessness on the highway, for, however strongly the instinct of self-preservation may appeal to them, their perceptions may prove inadequate to such a judgment of the speed of the prevailing traffic as will always ensure their safety and consequently the safety of the traffic; but in my opinion it is not competent to the Courts to reconsider the classification of former times and to include domestic animals of blameless antecedents in the class of dangerous animals even when wandering on the roadsides. It appears, I think, from *Cox* v. *Burbidge* (2) that in the case of animals not of a fierce disposition the owner is not under any duty to the public to prevent them straying on the highway: see the judgment of Erle C.J. The Highway Acts of 1835 and 1864, ss. 74 and 25 respectively, do not, in my opinion, impose any civil liability in

(1) (1866) L. R. 1 Ex. 280. (2) 13 C. B. (N.S.) 430.

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respect of animals trespassing upon the highway. So far as I know they have never been held so to do, and from their form I do not think they could have been intended to do so. They impose no positive obligation and contain no positive prohibition, but merely impose certain penalties upon the happening of certain events. I should be sorry to hold for the first time at this date that farmers are liable to a grave and unlimited liability in case of inadvertently or even wilfully permitting their cattle to trespass on the highway. Even if there was a duty owed by the defendant to the public using the road to keep his sheep safely enclosed (I have already said, I think, there was no such duty), I think that the charge of the sheep upon the motor car was not the natural consequence of its presence on the highway, and that the damage is too remote to be recoverable.

*Appeal dismissed.*

Solicitors for appellants: *Clifford, Turner & Hopton, for W. J. Rabnett, Birmingham.*

Solicitors for respondent: *Griffith & Gardiner, for Maddocks, Ogden & Co., Coventry.*

G. A. S.

[COURT OF CRIMINAL APPEAL.]

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*June* 5.

## THE KING *v.* WATSON.

*...nal Law—Receiving Goods knowing them to have been stolen—Possession or Control—Negotiator for Sale of Goods.*

A person who negotiates for the sale of goods which he knows to ...ve been stolen cannot be convicted of receiving the goods knowing ...em to have been stolen unless it is also proved that he has been possession or control of the goods.

At the trial of a prisoner for receiving goods knowing them to ...ve been stolen the recorder directed the jury that if the prisoner assisted to dispose of the stolen goods by negotiating for their sale he had been aiding and abetting the receivers of the goods and could be convicted of receiving the goods knowing them to have been stolen.

The jury found that the prisoner was guilty of "being a negotiator and in the full knowledge that the goods were stolen." That finding was taken by the recorder as a verdict of guilty, and he accordingly passed sentence upon the prisoner:—

*Held*, that the conviction must be quashed, inasmuch as the recorder had not directed the jury that in order to return a verdict of guilty they must find that the prisoner was in possession of the stolen property either by himself or jointly with the receivers in the sense that he had either exclusive or joint control of it and the jury by their verdict had left it in doubt whether the prisoner was in sole or joint possession of the stolen property, and whether he had possession in the sense of having control.

APPEAL by the prisoner Watson against his conviction.

The appellant was convicted on May 10, 1916, at the Manchester City Sessions of receiving goods knowing them to have been stolen, and sentenced to three years' penal servitude. It appeared from the evidence given at the trial that the appellant met two men, named Walker and Collins respectively, in Liverpool on April 3, 1916, who told him that they had some stuff which was stolen, or, as it appears to be sometimes called, "got on the cross." He asked them what sort of stuff it was, and they said rings, brooches, and other stuff, about 36 ozs. The appellant then crossed a ferry with the two men and went alone to a jeweller's shop and asked the jeweller if he would buy about 36 ozs. of gold. He told the jeweller that it was got from some place outside London,

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"on the cross." The jeweller declined to have anything to do with it, and later on the same day Walker, Collins, and the appellant were seen together, and were shortly afterwards arrested, a large portion of the stolen jewellery being found in Walker's possession.

The appellant was jointly charged with Walker and Collins upon an indictment, the first count of which was for shop-breaking and larceny, and the second count for receiving the goods knowing them to have been stolen. There was no evidence against either of the prisoners of shop-breaking or larceny, and the recorder so directed the jury. Walker pleaded guilty to the count for receiving and Collins and the appellant not guilty, and the trial accordingly proceeded against them.

At the close of the case for the prosecution counsel for the appellant submitted that there was no case against the appellant to go to the jury, on the ground that there was no evidence that the stolen property was ever in his possession or control.

Counsel for the Crown submitted that the appellant could be convicted under the Accessories and Abettors Act, 1861 (1), and it was taken by the recorder from the words of s. 3 of that Act and upon the view presented by counsel for the Crown that, notwithstanding the fact that the appellant was not charged as an accessory after the fact, he could be convicted on the count charging him with the substantive offence of receiving the goods knowing them to have been stolen.

The recorder accordingly decided to leave the case to the jury, and directed them that "if this man assisted to get rid of stolen goods then he has been aiding and abetting them and you can convict him of receiving the goods knowing them to have been

(1) Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 3: "Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished."

stolen." He then proceeded to deal with the evidence, and said: "Well, on that he is aiding and abetting people who have received stolen goods, and on that the law is that he also can be convicted of receiving these goods knowing them to have been stolen."

The jury found Collins guilty of receiving the goods knowing them to have been stolen, and that the prisoner was guilty of "being a negotiator and in the full knowledge that the goods were stolen." That finding was taken by the recorder as a verdict of guilty.

The prisoner Watson appealed. Collins did not appeal, and no question arose with regard to him or Walker.

*E. T. Nelson*, for the appellant. The conviction is bad. There was no evidence that the goods or their proceeds were ever in the possession or under the control of the appellant. A mere criminal intent to receive is insufficient: *Reg.* v. *Wiley*. (1) *Reg.* v. *Smith* (2) is distinguishable. In that case the prisoner did acts which were evidence that the watch was under his control. A person cannot legally be convicted of receiving goods knowing them to have been stolen unless it is proved they were in his possession or control. The appellant did not endeavour to dispose of the goods. He merely made inquiries of the jeweller. [Archbold's Criminal Pleading, 24th ed., pp. 1451, 1453, and *Rex* v. *Gleed* (3) were also referred to.]

*J. B. Sandbach*, for the prosecution. *Reg.* v. *Fallon* (4) is conclusive as to the appellant being an accessory after the fact. Although the jury described him as a negotiator, he was in law a receiver of the jewellery knowing it to have been stolen. The direction by the recorder that if he assisted the two other prisoners in disposing of the property he aided and abetted them was right. The jewellery was taken over the ferry, it then being in Walker's actual possession, and the appellant crossed the ferry with him and acted in concert with him and Collins. The position was in law exactly the same as if the appellant had the jewellery in his own pocket. He was aiding the two other men in disposing of the goods while they were in Walker's possession, and there was therefore evidence that he was

(1) (1850) 2 Den. C. C. 37.
(2) (1855) Dears. C. C. 494.
(3) (1916) 12 Cr. App. R. 32.
(4) (1862) L. & C. 217.

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in control of the goods within the principle enunciated in *Reg.* v. *Smith* (1), although the recorder did not specifically leave to the jury the question whether he was in control or not.

The judgment of the COURT (Lord Reading C.J., Scrutton and Shearman JJ.) was delivered by

LORD READING C.J., who, having stated the facts, continued: The question we have to decide is whether the finding of the jury that the prisoner was guilty of "being a negotiator and in the full knowledge that the goods were stolen" amounts to a verdict of receiving the goods knowing them to have been stolen.

Now it is clear from *Reg.* v. *Fallon* (2), decided in the year after the passing of the Accessories and Abettors Act, 1861, that if a person is indicted as a principal and not as an accessory he cannot be legally convicted upon the indictment if the evidence shows that he is merely an accessory after the fact: in other words, if he is charged with being a principal, and the evidence supports the charge, he can be convicted; but if the evidence only shows that he is an accessory after the fact he cannot be convicted of the substantive offence with which he is charged as a principal. The later case of *Richards* v. *Reg.* (3) is to the same effect. It therefore follows that the appellant could not be convicted as an accessory after the fact either to the stealing or receiving on the counts charging him with being a principal in those crimes, and if the case rested merely on the decision of that question there would be no doubt as to what the result must have been on the authorities.

But the recorder, in summing up, apparently treated the appellant as being an accessory after the fact and as if he therefore aided and abetted the other men in the commission of the offence. What the recorder meant by his direction is not quite clear. If he had directed the jury that if they came to the conclusion upon the evidence that the appellant was in possession of the stolen property either by himself or jointly with the other prisoners in the sense that he had either exclusive or joint control of it, it would be open to them, in law, to convict him, and if

(1) Dears. C. C. 494. (2) L. & C. 217.
(3) (1897) 61 J. P. 389.

they had taken that view on the facts, there might have been sufficient for this Court to support the conviction. But that was not the question left to them, and we cannot find anywhere in the direction any indication to the jury that that was the point to which they must direct their attention. We must therefore come to the conclusion that the direction as it stands cannot be supported.

Moreover, the jury by their verdict have left it in doubt whether the appellant was in their view in sole or joint possession of the stolen property or whether he had possession in the sense of having control. They found that he was a negotiator for disposing of the jewellery with the full knowledge that the goods were stolen, but in our view it cannot be said that that amounts to a finding that he was in possession or control of the goods. If he was merely directing the other two men to a place where he thought they might conveniently dispose of the stolen property, or was merely acting in the capacity of a messenger or conduit-pipe between the person he thought might become a purchaser and the receivers, it cannot be said that that finding means that he was either in possession or control of the goods. Being in possession or control of the goods is necessary in order to constitute the offence with which he was charged. There was therefore a direction to the jury which is not right in law, and a verdict which does not affirm against the appellant that which might have been found on the evidence if there had been a proper direction. That being so, notwithstanding that there is the clearest evidence that the appellant had full knowledge that the other two persons were in possession of stolen property and that he was assisting them to dispose of it, it is impossible to support the conviction. The powers of this Court are not sufficient to warrant us in entering a verdict against the appellant of a different kind from that found where there is no count in the indictment which would support that verdict. Moreover, we cannot come to the conclusion that on a proper direction the jury would have found a verdict against the appellant of receiving the goods knowing them to have been stolen. They might have done so, but that is not sufficient to justify us in upholding the conviction. To enable us to do so we must be satisfied that they would have found that verdict, and their ambiguous finding simply indicates to us

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doubt as to what their verdict would have been upon a proper direction.

For these reasons we have no alternative but to quash the conviction.

*Appeal allowed.*

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution: *Director of Public Prosecutions.*

J. E. A.

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*May* 29.

## BARNETT *v.* JAVERI & CO.

[1916 B. 311.]

*Sale of Goods—Contract—"Subject to safe arrival"—Ship by which Goods to be carried not named.*

The defendants entered into a contract with the plaintiff for the sale to him of about four tons of hematine crystals "subject to safe arrival." The defendants had made a contract for the delivery to themselves of the crystals, which were expected by their vendor to arrive from Alexandria. No ship was named in the contract between the plaintiff and the defendants as that by which the crystals were to arrive. The defendants' vendor not being able to obtain delivery of the crystals was unable to supply them to the defendants, who in their turn were unable to fulfil their contract with the plaintiff:—

*Held*, that under the contract between the plaintiff and the defendants there was an obligation on the defendants to ship the goods or to get them so far under their control that they were placed on board some ship; that not having done so they were not protected by the words "subject to safe arrival," which meant that provided the defendants shipped the goods they were not to be liable for non-delivery consequent upon any accident occurring to the goods in transit and preventing their safe arrival; and that the defendants were liable to the plaintiff in an action for damages for non-delivery of the crystals.

ACTION tried in the Commercial Court before Bailhache J. without a jury.

The action was brought by the plaintiff, Anthony Joseph Barnett, a merchant, of Mincing Lane, E.C., trading as R. L. Barnett & Co., against Messrs. Javeri & Co., merchants and shippers, of Manchester

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and Bombay, to recover damages for breach of a contract, dated September 24, 1915, to deliver four tons of hematine crystals (an extract of logwood used for dyeing purposes) to the plaintiff at 2*s.* per lb.

The terms of the contract of September 24, 1915, were contained in the following letter of that date from the defendants to the plaintiff: "With reference to our conversation per telephone this afternoon, we have pleasure in booking for you about four tons of hematine crystals at 2*s.* per lb. ex Liverpool, net cash against invoice, and subject to safe arrival; delivery about 3/4 weeks. As requested by you we will have these goods forwarded to London, you to pay the cost of carriage from Liverpool to London."

For the purposes of his decision the learned judge assumed that at the time of the contract of September 24, 1915, the defendants had made a firm contract with Mr. Whittle, a dye and chemical dealer, for the delivery to them of four tons of hematine crystals at 1*s.* 9*d.* per lb. In consequence of Mr. Whittle not having received the hematine crystals from a firm in Alexandria from whom he had bought them, he was unable to fulfil his contract with the defendants. The plaintiff at the defendants' request waited for the goods until January 19, 1916, the defendants hoping until that date that they would be able to obtain the crystals and so supply the plaintiff with them, but ultimately, on January 19, 1916, the defendants, finding it was impossible to obtain the crystals, wrote to the plaintiff saying that "As you are already aware, our contract with our supplier contained the same condition as our contract with you, namely 'subject to safe arrival.' Our supplier has been advised that the meaning of this expression is that there is no contract for the delivery of the goods unless and until they do in fact arrive, when he promises we shall be informed and delivery be made. We ourselves adopt this construction and must leave you to take such course as you may be advised."

On January 24, 1916, the plaintiff wrote in reply saying that he could not agree that the words "subject to safe arrival" had any bearing upon the matters in question, and the action was shortly afterwards commenced.

At the trial evidence was given (de bene esse) to the effect that there is among merchants a customary meaning attached to the

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words that the contract becomes void if the goods the subject-matter of the contract are lost in the course of transit, and that the words refer entirely to accidental and fortuitous loss through war, or perhaps by sea perils, in the course of transit; but that unless the goods have been in existence in the hands of the seller the words do not apply.

Evidence was also given to the effect that the price of hematine crystals on January 19, 1916, was from 5*s.* to 5*s.* 6*d.* per lb.

*Maurice Hill, K.C.*, and *Harold Morris*, for the plaintiff. The words "safe arrival" more completely connote than the word "arrival" that the goods to which they refer will be subject to a certain risk. The goods must therefore be in existence and in the hands of the seller in order that the words may have any application.

*A. M. Langdon, K.C.*, and *T. B. Leigh*, for the defendants. Unless there is an arrival of the goods within the specified time the condition under which the contract is to become operative has not happened, and there is consequently no breach of contract. In other words, there is no warranty by the seller that the goods which have been sold are or will be shipped: *Vernede* v. *Weber* (1); *Smith* v. *Myers*. (2) *Johnson* v. *Macdonald* (3) shows that if a named steamer had been mentioned no action could have been maintained, and the fact that no steamer was mentioned makes no difference. The difficulties in obtaining supplies in consequence of the war must be taken into account in construing the clause, and the defendants are protected by it as they had a reasonable expectation of obtaining the crystals. [Halsbury's Laws of England, vol. 25, p. 144; Benjamin on Sale, 2nd ed., p. 463, 5th ed., p. 582; *Idle* v. *Thornton* (4); *Lovatt* v. *Hamilton* (5); *Alewyn* v. *Pryor* (6); *Gorrissen* v. *Perrin* (7); *Hale* v. *Rawson* (8); and *Hayward* v. *Scougall* (9) were also referred to.]

*Maurice Hill, K.C.*, in reply. The authorities which have been cited do not afford much assistance in the determination of the present case. They relate to cargoes by particular ships where the

(1) (1856) 1 H. & N. 311.
(2) (1870) L. R. 5 Q. B. 429.
(3) (1842) 9 M. & W. 600.
(4) (1812) 3 Camp. 274.
(5) (1839) 5 M. & W. 639.
(6) (1826) Ry. & M. 406.
(7) (1857) 2 C. B. (N.S.) 681.
(8) (1858) 4 C. B. (N.S.) 85.
(9) (1809) 2 Camp. 56.

cargoes are only the subject of an estimate, not of a warranty. But in the present case there was an absolute undertaking to ship the cargo. The effect of the argument for the defendants is that they are only bound to deliver to the plaintiff such of the goods as they happen to obtain. That would not be a business contract. [*Boyd* v. *Siffkin* (1) and *Hawes* v. *Humble* (2) were also referred to.]

BAILHACHE J., after stating the facts, continued : The defendants having on January 19, 1916, repudiated the contract, the plaintiff a few days afterwards accepted the repudiation, and thereupon this action was brought.

The question turns upon the construction of the words "subject to safe arrival" in the defendants' letter of September 24, 1915. They are, at the present time, new words in a contract of this description. Years ago "subject to safe arrival" or similar words, such as "subject to arrive," were very common indeed, but they have dropped out of modern contracts and have only come into these particular contracts since the beginning of the war. The question, therefore, is what do these words mean ?

I am not quite sure that the evidence which was given with regard to the meaning of the words was strictly admissible. I am inclined to think that the construction of the contract is for me. It is not suggested that the words have any particular trade meaning, and I have to give effect to what I think is their natural meaning as I find them in a contract of this description, and I proceed to consider the words and the construction of the contract as though the evidence had not been given.

In all the old cases which have been cited, with one possible exception, where this matter has been debated the words in the contract have referred to an arrival by a particular named steamer, and, speaking generally, the question has turned upon whether there was or was not to be found in the terms of the contract a warranty that the goods the subject-matter of the contract were in fact on board a particular steamer. If there was such a warranty the vendor was held to be liable to deliver or pay damages for failure to deliver ; if there was not a warranty the vendor succeeded, and the buyer failed to get either his goods or his damages.

(1) (1809) 2 Camp. 326. (2) (1809) 2 Camp. 327, n.

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It seems to me that there is a fundamental difference between contracts which refer to the arrival of goods by a particular steamer and an indefinite contract of this description, which refers to no particular steamer at all, but merely relates to the safe arrival of the goods.

In my judgment the defendants contracted to sell four tons of hematine crystals at a definite price, ex Liverpool, to be delivered within a period of three or four weeks, but they have protected themselves against one contingency, namely, the contingency of the goods not arriving safely. The activities of submarines and the dangers of mines are matters of common knowledge, and the defendants have protected themselves against contingencies of that nature by providing that they shall not be under an obligation to deliver unless the goods arrive safely.

I attach a good deal of importance to the word "safely." It seems to me to show that what the parties were dealing with when speaking of arrival was the danger to which these goods were likely to be subjected in the course of transit.

Is it open to the sellers to say in effect "We bought the goods but our seller did not deliver them to us, and as it is therefore impossible that the goods can arrive we are protected by the words"? In my judgment that is not what the contract means. Under the contract the sellers' obligation is to ship the goods or to get them so far under their control that they are put on board some ship or other. But, having shipped them, if any accident occurs in transit, then they are not liable for non-delivery.

The effect of the words "subject to safe arrival" is similar to that of an exception clause which a seller must bring himself within in order to excuse non-delivery, and in order to do that he must ship the goods and then show that he has not delivered them in consequence of their not having arrived safely.

In my judgment the plaintiff was right in this case, and the sellers are without excuse.

There is the question as to the measure of the damages. The measure of the damages would, in ordinary circumstances, have been the value of the goods to the buyer at the time when they ought to have arrived in this country. They ought to have arrived long before January 19, but the buyer waited at the sellers' request, the

sellers constantly telling him that the goods would come. The buyer, therefore, is entitled to take the measure of his damages at the date, about January 19, when the sellers expressed their belief that they would be unable to fulfil their contract. I think, on the evidence, that if I take it at 5*s.* per lb. I shall be doing justice. That will give 1344*l.* as the sum which the vendors have to pay.

*Judgment for plaintiff.*

Solicitors for plaintiff: *Cosmo Cran & Harper.*

Solicitors for defendants: *Chester & Co., for Brett, Hamilton & Tarbolton, Manchester.*

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## HOOD *v.* WEST END MOTOR CAR PACKING COMPANY. E. J. MURRAY, THIRD PARTY.

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*June* 5.

*Marine Insurance—"Held covered" Clause—Error in Description of Interest—Liberties as per Contract of Affreightment—Institute Cargo Clauses* 4, 7.

By a policy of marine insurance a motor car was insured against "all risks and breakage." The policy was in the ordinary Lloyd's form with the Institute Cargo Clauses attached, clause 4 of which provides that the assured is "Held covered, at a premium to be arranged, in case of . . . . any omission or error in the description of the interest," and clause 7 contains the words "Including all liberties as per contract of affreightment." By the terms of the bill of lading under which the car was shipped the shipowners were authorized to carry it on deck "at shipper's risk," and it was carried on deck accordingly. There was evidence that many underwriters would refuse to insure at any premium a car shipped on deck except against total loss, and that those who would be willing to insure it at all would require an unusually high premium:—

*Held*, that the assured was not protected by either of the above-mentioned clauses; that clause 4 was intended to be limited to errors of description of such a kind that if the subject-matter had been correctly described it would still have been insurable by any underwriter in the market and at a trifling increase of premium, while the "liberties as per contract of affreightment" referred to in clause 7 were confined to acts which would not materially increase

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the underwriters' risk, and were therefore authorized to be done without any increase of premium; and that the risk was consequently not covered by the policy.

TRIAL of action before Rowlatt J. without a jury.

The plaintiff at the end of October, 1914, being desirous of sending a motor car from London to Messina, applied to the defendant company to give him an estimate for packing, shipping, and insuring the car, and the defendants in reply quoted as follows: "To packing and freighting same to Messina 31*l.* 10*s.* Insurance extra. All risks and breakage 12*s.* 6*d.* per cent. War risk 20*s.* per cent." The plaintiff accepted the said estimate, except so far as applied to war risk, being content to take the chance of war risk himself, and he instructed the defendants to pack and ship the car and insure it against marine risks on the terms quoted. The defendants, being only packers, employed G. W. Sheldon & Co., a firm of shipping agents, to arrange for the shipping and insurance. They arranged with the General Steam Navigation Company to carry the car to Messina on board the steamship *Hero* on the terms of a note containing the conditions of carriage which included "Liberty to carry on deck at shipper's risk." They then instructed Mr. E. J. Murray, an outside broker, to effect the policy of insurance. The defendants had suggested to Messrs. Sheldon the employment of Murray as the insurance broker, believing him to be a member of Lloyd's in consequence of a letter written by him to them on February 25, 1914, in which he said "Our syndicate is a first-class one at Lloyd's." He in turn employed Messrs. Byas, Moseley & Co., a firm of regular brokers at Lloyd's, who procured subscriptions to a policy for "500*l.* on motor car and accessories (in case) so valued" at a premium of 10*s.* per cent. The policy was in the ordinary Lloyd's form, with the Institute Cargo Clauses attached, No. 4 of which is as follows: "Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage"; and No. 7 contains the words "Including all liberties as per contract of affreightment." The bill of lading, dated December 8, 1914, under which the car was shipped described the goods as "one case motor car on deck at shipper's risk," and contained a clause "Goods . . . if shipped on deck (as the shipowners are hereby authorised to do)

are so shipped at merchants' risk." On January 5, 1915, Messrs. Sheldon wrote to Murray to inform him that the car was being shipped on deck and to ask whether that would make any difference to the premium. On receipt of that letter Murray, according to his own statement, telephoned to Messrs. Byas, Moseley & Co. to inquire whether the fact of carriage on deck would affect the premium, and was informed over the telephone that it would not, but no letter confirming the alleged telephonic message was produced. Murray then informed Messrs. Sheldon that the underwriters would not require any increase of premium in consequence of the car being shipped on deck, with the result that the ship sailed on January 8 without any alteration having been made in the policy. The ship met with rough weather on the voyage, and in consequence the car was so damaged by the action of the waves that on arrival at Messina it was found to be beyond repair and valueless.

The underwriters repudiated their liability to pay the loss on the ground of the non-disclosure to them of the fact of the car being carried on deck; and the plaintiff being advised that he could not recover from them brought his action against the defendants for having in breach of their contract allowed the car to be shipped on deck instead of in the hold, and for having negligently failed to cause it to be insured against "on deck" risks. The defendants, in the event of their being held liable to the plaintiff, claimed to be indemnified by Murray upon the ground that the negligence, if any, in failing to insure the car on deck was his and not theirs. There was evidence that the risk was very considerably increased by the car being on deck. One witness said "A great many underwriters would not touch it on deck; it is a matter of special bargain; it is necessary to tell the underwriters, otherwise it is not covered"; while another said that there would be great difficulty in getting a car insured on deck except under f.p.a. conditions, and that those underwriters who would be willing to insure it on deck against "all risks" would require a considerable increase of premium.

*Barnard Lailey, K.C.*, and *E. F. Spence*, for the plaintiff. The defendants having undertaken to ship and insure the car were bound to take all reasonable precautions to provide that it should not be

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injured on the voyage and to cause it to be insured against all risks other than war risks. They were responsible for Messrs. Sheldon's negligence in the performance of that duty, and that firm were negligent in permitting the car to be carried on deck in the winter time through the Bay of Biscay, and still more so, when they knew it was going to be so carried, in not causing it to be insured against "on deck" risks. By clause 17 of the Rules for Construction of Policy in Sched. I. to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), "In the absence of usage to the contrary, deck cargo . . . . must be insured specifically, and not under the general denomination of goods." Here the car ought to have been described in the policy as a car on deck, for there is no suggestion that there is any usage to insure a car which is in fact shipped on deck without specifying that it is so shipped. It will be contended by the defendants that, notwithstanding the omission to mention that fact, the policy is a valid insurance, by virtue of clauses 4 and 7 of the Institute Cargo Clauses which were attached. But neither of those clauses has any application to the present case. The word "interest" in clause 4 must no doubt be taken to mean the subject-matter insured: *Hewitt Brothers* v. *Wilson* (1); but the omission to state that the car was on deck was not an "omission or error in the description" of that subject-matter. Deck-carried goods are something totally different from goods carried in a hold, and the evidence is that a much higher premium would be required in respect of them. The clause does not allow of a fundamental change of risk. In *Maritime Insurance Co.* v. *Stearns* (2) it was held that a similar clause by which the assured was, in the event of a "change of voyage," to be held covered at a premium to be arranged did not apply to a delay of the voyage whereby it was changed from a good time of year to a bad time, so that the risk was materially altered. Nor does clause 7 apply here. The shipowners were authorized by the bill of lading to put the car on deck, but that was not a liberty within the meaning of the clause. The "liberties" there referred to are liberties which are incidents of the voyage, such as a liberty to deviate, to dispense with a pilot, or to tranship the goods. The question as to the part of the ship in which the goods are to be placed is a question not of liberty but of subject-matter.

(1) [1915] 2 K. B. 739. (2) [1901] 2 K. B. 912.

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*Newbolt, K.C.*, and *Lawton*, for the defendants. The policy effected was a valid insurance of the subject-matter against "on deck" risks. No doubt the fact of the car being on deck ought to have been specified, but the omission is remedied by the introduction of the Institute Cargo Clauses. There is no reason for limiting the kind of omissions to which clause 4 applies in the manner suggested by the plaintiff. Clause 7 also applies. That it does so is made clear by the fact that the note of conditions on which the shipowners were prepared to carry the car uses the expression "liberty" in connection with the right reserved by them of carrying the car on deck. The contract of affreightment consists of the bill of lading coupled with that note. But even if the Institute Cargo Clauses do not apply, and if consequently the policy did not cover the car, the defendants still are not liable, for they were not guilty of any negligence. Their contract with the plaintiff allowed them to employ a broker to effect the insurance, for they were not brokers themselves, and in employing Murray to effect it they naturally, having regard to the terms of his letter of February 25, 1914, thought that they were employing a member of Lloyd's. There was no negligence in not verifying the correctness of his statement, and if it was reasonable for the defendants to employ him they are not responsible for his negligence or ignorance of marine insurance law.

*Leck, K.C.*, and *M. O'Connor*, for Murray. Clause 4 of the Institute Cargo Clauses applies to any case coming within its terms however great the increase in the underwriters' risk may be. It would not indeed apply to the conscious substitution of a totally different kind of goods, for that could not come within the terms "omission or error in the description." But it would apply to a deviation however great, or to the substitution of a wholly different and more perilous voyage. In *Hewitt Brothers* v. *Wilson* (1), where second-hand machinery was insured as "machinery" simply without the addition of the word "second-hand," it was held that although the word omitted was material and substantially altered the risk, that did not prevent the application of the clause. The reason why in *Maritime Insurance Co.* v. *Stearns* (2) the clause was held not to apply was because there was no "change of voyage";

(1) [1915] 2 K. B. 739. (2) [1901] 2 K. B. 912.

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it was the same voyage, between the two named termini, though at a different time of year. If the defendants or Messrs. Sheldon had known at the time of effecting the policy that the car was going to be on deck, that would have been a different matter, for the omission to state the fact would have been a concealment. But here it was not known until a later date, and under those circumstances the assured are held covered.

ROWLATT J. In this case I think the plaintiff is entitled to recover. The plaintiff wanted a motor car for his use in Sicily; he bought it in England and went to the defendants to pack it and send it out for him, and they gave him an estimate in these terms: "To packing and freighting (motor car) to Messina 31*l.* 10*s.* Insurance extra. All risks and breakage 12*s.* 6*d.* per cent." That estimate the plaintiff accepted; therefore the defendants contracted to pack and ship the car to Messina and to procure it to be insured against all risks and breakage. Now the defendants having packed it sent it on board to be carried on deck, a mode of carriage of which the plaintiff, had he known of it, would probably not have approved; but I do not think that we need trouble ourselves about that, for the real ground of complaint was that, having shipped it on deck, the defendants neglected to insure it so as to protect it. The defendants contend that the policy which was effected was a valid one, and that if the underwriters had been sued upon it they would have been compelled to pay; but I have come to the conclusion that the car was not covered by the policy. Now a motor car on deck is certainly not within the description in the body of the policy. That description merely says "500*l.* on motor car and accessories (in case) so valued." It was not suggested that there was any usage to insure motor cars on deck otherwise than specifically, so as to satisfy the Rules for Construction of Policy in the schedule to the Marine Insurance Act, but the point, and the only point, made was that the fact of this car being on deck was brought within the policy by virtue of clauses 4 and 7 of the Institute Cargo Clauses which were attached to it. Clause 4, which was referred to as the "held covered" clause, says "Held covered at a premium to be arranged in case of . . . . any omission or error in the description of the interest." Now it has been held that

the word "interest" in that clause means subject-matter, and what I have to decide here is whether a motor car shipped on deck can be brought within this policy by treating the omission of the statement that it is on deck as an error in the description of the subject-matter. I read that clause as intended to apply to certain cases in which there has been some error in the description sufficient to put the subject-matter outside the terms of the policy, but not to all such cases irrespective of the degree of the error; the clause must be read with some limitation. Of the witnesses called before me one said that the risk was very considerably increased by the car being on deck, and that it was essential to inform the underwriters of it; that a great many underwriters would not touch the risk, and that in any case it must be made the subject of a special bargain; while another said that it would be very difficult to procure the insurance of a motor car on deck except under f.p.a. conditions. Having regard to that evidence, I think that the subject-matter must be one which, if correctly described, could be insured at some trifling increase in the premium. It must be one which the parties would contemplate as being certainly insurable by any underwriter in the market. That is involved in the words "at a premium to be arranged." They contemplate there being a market rate for such a subject-matter, whereas the evidence shows that there is no such thing as a market rate for a motor car on deck. I am therefore compelled to the conclusion that the omission to state that the car was to be carried on deck put it outside the scope of this clause. Then it was contended that the shipping of the car on deck came within the words of clause 7, "Including all liberties as per contract of affreightment." No doubt the putting of the car on deck is treated both in the original proposal of the terms of shipment and in the bill of lading itself as a matter which is at the option of the shipowner, and in that sense it is a liberty, but I do not think that it is what is meant by a liberty in this clause. There is no question here of any premium to be arranged. The liberties referred to are thrown into the contract as it stands at the premium specified in it. There are plenty of liberties, such as the liberty to sail with or without a pilot, or the liberty to deviate for the purpose of calling at various ports, which do not substantially increase the underwriters' risk and which they are content to allow to be done without

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any increase of premium, although they might become technical defences to an action on the policy if the clause permitting them were not introduced into it. But the evidence to which I have referred shows that the difference in the risk of a car shipped on deck and of one shipped in the hold is very great and must materially affect the amount of the premium to be charged. I cannot think that by attaching this clause to the policy the underwriters intended to authorize the carrying of the car on deck. On the construction, therefore, of these clauses I must decide in favour of the plaintiff. It remains to consider whether the defendants were negligent in the execution of the duty which they had undertaken by their contract. What they contracted to do was to take all reasonable steps to procure a valid insurance of the car. In order to discharge their duty under that contract I think that the very least they were bound to do was to employ directly a regular Lloyd's broker and not to leave the selection of the broker to a firm of transport agents such as Messrs. Sheldon. I do not think that by leaving the matter in the hands of that firm and allowing them to employ an outside broker like Mr. Murray they were properly discharging their duty to the plaintiff, and they must, in my judgment, be held responsible for the insurance never having been validly effected; and the damages for which they are so liable must be the amount which would have been recovered if the car had been properly insured.

[The case was then proceeded with as between the defendants and the third party, with the result that the judge held the third party liable to the defendants for the amount for which judgment had been recovered against them less the amount, to be ascertained, of the extra insurance for which an alteration of the policy covering the "on deck" risk could have been obtained.]

*Judgment for the plaintiff; and judgment for the defendants against the third party.*

Solicitors for plaintiff: *Capel Cure & Ball.*
Solicitor for defendants: *Richard Brooks.*
Solicitors for third party: *Yardley Tilley & Co.*

J. F. C.

SLATER, APPELLANT *v.* EVANS, RESPONDENT.

1916
*June* 20.

*Sunday Observance—Sale of Ice-Cream on Sunday—Whether Ice-Cream "Meat"—Sunday Observance Act*, 1677 (29 *Car.* 2, *c.* 7), *ss.* 1, 3.

Ice-cream is not "meat" within s. 3 of the Sunday Observance Act, 1677.

CASE stated by justices of Aberavon.

The appellant was charged with having on Sunday, December 26, 1915, unlawfully aided and abetted one Berni to exercise certain worldly labour, business, and work in his ordinary calling of a shopkeeper, the same not being a work of necessity or charity, contrary to the Sunday Observance Act, 1677. (1)

The following facts were proved :—Berni (the principal offender), who was a licensed refreshment-house keeper, was convicted on December 30, 1915, for carrying on his ordinary trade or calling of a shopkeeper upon Sunday, December 26, 1915, and he had on several previous occasions been convicted of a similar offence. The appellant, whose ordinary calling was that of a seaman, was in Berni's shop at 6.45 P.M. on Sunday, December 26, 1915, and was seen coming out of the shop eating an ice-cream wafer, part of which he consumed outside the shop. The ice-cream wafer was composed of milk, sugar, eggs, and egg powder solidified by ice, sandwiched between two biscuits, and sold in that condition. The appellant had been on Berni's premises before on a Sunday, and he knew and admitted that Berni kept a sweet shop for the sale of sweets, cigarettes, tobacco, ice-cream, non-intoxicating drinks and refreshments.

For the appellant it was contended (inter alia) that an ice-cream

(1) Sect. 1 of the Sunday Observance Act, 1677, prohibits tradesmen and others exercising "any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted)."

Sect. 3 provides that "nothing in this Act contained shall extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cooks' shops, or victualling houses, for such as otherwise cannot be provided."

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wafer was a sweetmeat, and was " meat " within s. 3 of the Sunday Observance Act, 1677.

For the respondent it was contended that there was sufficient evidence to prove that the appellant knew that Berni was carrying on his ordinary trade or business on the Sunday, and that the point whether an ice-cream wafer was " meat " did not arise as the wafer was consumed off Berni's premises where it was bought.

The justices convicted the appellant, and they accepted the respondent's contention that as the ice-cream wafer was partly consumed off Berni's premises the question whether or not it was " meat " did not arise.

The question for the opinion of the Court was whether the conviction was right.

*Rigby Swift*, K.C. (*Rowland Thomas* and *Stone Hurst* with him), for the appellant. The justices were wrong in their view that because the ice-cream wafer was partly consumed off Berni's premises it was unnecessary to decide whether the ice-cream wafer was " meat " within s. 3 of the Act of 1677. Whether it was " meat " was the real question to be decided, and it was quite immaterial where the wafer was consumed : see per Lord Alverstone C.J. in *Bullen* v. *Ward*. (1) In s. 3 " meat " is not limited to flesh : *Bullen* v. *Ward*. (1) In *Amorette* v. *James* (2) Lord Coleridge J. and Shearman J. reserved their opinion upon the point whether ice-cream could come within the section as being " meat." In that case the composition of the ice-cream was not stated ; here it is. Each of the ingredients constitutes " meat," and those ingredients do not cease to be " meat " when solidified by ice.

The respondent was not represented.

DARLING J., after stating the facts and referring to the provisions of the Sunday Observance Act, 1677, continued as follows : It is said on behalf of the appellant that the ice-cream wafer bought by him was " meat." That word, I agree, may be used as denoting anything that can be eaten. We sometimes speak of a thing being as full of something, as " an egg is full of meat " ; that " what is one man's meat is another man's poison " ; and it is quite common to

(1) (1905) 74 L. J. (K.B.) 916. (2) [1915] 1 K. B. 124.

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Darling J.

speak of "meat and drink." In expressions such as those the word "meat" is of course not limited to flesh. In this case, however, what we have to decide is not whether ice-cream can be described as "meat" in a sense that may be found in a dictionary or in some proverbial expression, but whether it can be described as "meat" within the meaning of that term as used in s. 3 of the Act of 1677. In my opinion ice-cream cannot be described as "meat" within that section. The Act was intended to prevent people exercising their ordinary calling on Sunday. Some things had necessarily to be permitted, and so the statute makes an exception in favour of "works of necessity and charity." It also occurred to those who framed the Act that it was necessary to make provision against people being prevented from obtaining their Sunday dinner. Some people prepared that meal at home; others got it from a cookshop. Accordingly the exemption contained in s. 3 was inserted as to the dressing of meat on Sunday. We are now asked to say that the preparing of ice-cream by mixing sugar and other ingredients, solidifying them by ice, and putting the mixture between two biscuits is the dressing of "meat." I am clearly of opinion that it is not. Whether the wafer was consumed inside or outside the shop is for this purpose of no materiality.

With regard to the cases which were cited to us, I think it is plain that many judges, not liking this kind of legislation,—I do not like it myself—have tried to get out of the statute by holding or suggesting that all kinds of things might be "meat" although they were not. That is not an effective way of getting rid of the statute. In my opinion the best way to attain that object is to construe it strictly, in the way the Puritans who procured it would have construed it; if that is done it will very soon be repealed. The appeal must be dismissed.

AVORY J. I am of the same opinion. I observe that in *Amorette* v. *James* (1) two of the judges suggested that upon some future occasion it might be held that ice-cream came within s. 3 of the Act of 1677 as being "meat." Speaking for myself, that occasion has not yet arisen. While it may be contended that in some secondary sense ice-cream may be "meat," I am clearly of opinion that it is

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not " meat " within s. 3—that is to say, it is not meat sold " in inns, cooks' shops, or victualling houses, for such as otherwise cannot be provided." Therefore on that ground I agree that the conviction was right and that the appeal should be dismissed.

HORRIDGE J. In *Amorette* v. *James* (1), where this point did not directly arise, I expressed the view that it was impossible to hold as a matter of law that ice-cream must of necessity be " meat " within the section. I agree that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellant: *Wrentmore & Son, for T. W. Lewis & Crockett, Pontypridd.*

J. S. H.

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*May* 11, 12.

[IN THE COURT OF APPEAL.]

## THE KING *v.* THE JUSTICES OF ESSEX.

## *Ex parte* BARKING TOWN URBAN DISTRICT COUNCIL.

*Local Government—District Council—Knacker's Yard—Licence—Appeal to Quarter Sessions from Grant or Refusal—Knackers Act,* 1786 (26 *Geo.* 3, *c.* 71), *s.* 1—*Towns Improvement Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 34), *ss.* 125-131—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 169—*Public Health Acts Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *ss.* 7, 29—*Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), s. 27.

A knacker's licence such as was formerly granted by quarter sessions under the Knackers Act, 1786, may now be granted by a district council under the Public Health Act, 1875 (which incorporates the Towns Improvement Clauses Act, 1847), and the Public Health Acts Amendment Act, 1890.

From the refusal of such a licence by a district council an appeal lies to quarter sessions under s. 7 of the Public Health Acts Amendment Act, 1890, notwithstanding s. 27, sub-s. 2, of the Local Government Act, 1894.

An additional licence for a knacker's yard under the Knackers Act, 1786, is not necessary.

Decision of the Divisional Court affirmed.

APPEAL from the decision of a Divisional Court (Ridley, Avory, and Lush JJ.); reported [1916] 1 K. B. 665.

(1) [1915] 1 K. B. 124.

A rule nisi had been granted for a certiorari directed to the keepers of the peace and justices in and for the county of Essex to remove into the King's Bench Division an order made by them at the general quarter sessions holden on May 1, 1915, upon the appeal of B. A. P., Limited, against the refusal of the Barking Town Urban District Council, the applicants for the rule, to grant or renew a licence to use and occupy as a knacker's yard certain premises situate within the urban district of Barking Town, by which said order it was ordered that the decision of the applicants should be reversed and that unto B. A. P., Limited, hereinafter called the respondents, should be granted a licence as aforesaid, upon the ground that the Court of quarter sessions had no jurisdiction.

From the affidavits in support of the rule nisi the following facts appeared :—On January 1, 1915, an application was made to the applicants by the respondents, a limited company, of Carlton House, Regent Street, London, for a licence, in pursuance of the provisions of the Public Health Act, 1875, and the Public Health Acts Amendment Act, 1890, and all other statutory provisions in that behalf, to use and occupy as a knacker's yard certain premises adjacent to River Road, Creekmouth, within the urban district of Barking Town, which premises were formerly in the occupation of the Midland Cattle Products, Limited, who held a knacker's yard licence in respect of them.

On January 12, 1915, this application was considered by the public health committee of the applicants. On January 26 the applicants refused the licence. The respondents then appealed to the general quarter sessions of the peace for the county of Essex. The appeal was heard on April 7 and May 1, 1915. On the hearing of the appeal objection was taken on behalf of the present applicants that the quarter sessions had no power under the Public Health Acts to grant a licence to use or occupy the premises as a knacker's yard, and that no appeal lay to the quarter sessions from the refusal of the applicants to grant such a licence, and that s. 7 of the Public Health Acts Amendment Act, 1890, did not confer upon the quarter sessions any such appellate jurisdiction or enable that Court to grant any licence to use and occupy the premises as a knacker's yard, inasmuch as the power given to quarter sessions by the Knackers

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Act, 1786, had by s. 27 of the Local Government Act, 1894, been expressly transferred to the applicants. (1)

This objection was overruled by the quarter sessions. The appeal was heard, and the justices decided that a licence to use and occupy the premises as a knacker's yard should be issued to the present respondents for one year, and such a licence was issued accordingly.

The rule nisi was obtained with a view to quashing this order of the quarter sessions.

For the purpose of showing cause against the rule nisi the respondents by their secretary filed an affidavit stating the following facts :—The applicants, in pursuance of the powers conferred upon them by the statutory provisions in that behalf, granted a licence to the Midland Cattle Products, Limited, for the period of one year from January 1, 1914, to use and occupy as a knacker's yard the premises in question for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle which should not be killed for butcher's meat.

The respondents were a company formed under the auspices of the Royal Society for the Prevention of Cruelty to Animals for the purpose (among others) of endeavouring to bring about a cessation of the exportation of aged and decrepit horses from England by purchasing and dealing with such horses in this country, of promoting humane methods of disposing of worn-out horses and other animals, and of utilizing the carcases for industrial purposes. In August, 1914, they acquired by purchase from the Midland Cattle Products, Limited, the premises and business of that company comprising the premises in question, and went into occupation of the premises. Except during the period from January 1 to May 1, 1915 (the time covered by the refusal of the applicants to grant a licence), they had carried on at the premises the business so acquired. They gave to the inspector of nuisances notice of the change of occupation. On January 1, 1915, they applied to the applicants for a grant of a licence, in pursuance of the provisions of the Public Health Act, 1875, and the Public Health Acts Amendment Act, 1890, and all other statutory provisions in that behalf, to use and

(1) See note on p. 425, post.

occupy as a knacker's yard the premises formerly in the occupation of the Midland Cattle Products, Limited, in respect of which that company held a knacker's yard licence granted by the applicants as aforesaid.

The affidavit went on to state the refusal of the applicants to grant the licence. The Public Health Acts Amendment Act, 1890, had since the year 1890 been in force in the applicants' district.

The Divisional Court held that a knacker's licence such as was formerly granted by quarter sessions under the Knackers Act, 1786, might now be granted by a district council under s. 29 of the Public Health Acts Amendment Act, 1890, and further that from a grant or refusal of such a licence by a district council an appeal lay to quarter sessions under s. 7 of the later Act, notwithstanding s. 27, sub-s. 2, of the Local Government Act, 1894.

The applicants appealed.

*Colam, K.C.*, and *Fortune*, for the appellants. Sect. 1 of the Knackers Act, 1786, prohibits a person from keeping or using any house or place for the purpose of slaughtering any horse, &c., "which shall not be killed for butchers meat," without first taking out a licence from the justices at quarter sessions, who are empowered to grant a licence upon a certificate that the applicant for the licence is a person fit and proper to be trusted with the management and carrying on of the business; and by s. 8 any person slaughtering any such animal for any other purpose than for butcher's meat without a licence shall be guilty of felony. That Act deals with knackers' yards, and the licence under it is a licence personal to the applicant, who must be a person of good character, and the quarter sessions alone had power to issue such a licence. It is a police Act. The power of quarter sessions to license knackers' yards within a county district is now, by s. 27, sub-s. 2, of the Local Government Act, 1894, transferred to the district council. "County district" is defined by s. 21, sub-s. 3, as including every urban and rural district whether a borough or not. Therefore, so far as regards the personal licence under the Knackers Act, 1786, the district council is the authority for granting the licence, and not the quarter sessions and there is no provision for an appeal to quarter sessions. By ss. 125—131 of the Towns Improvement Clauses Act, 1847 (which

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are by s. 169 of the Public Health Act, 1875, incorporated in that Act so far as regards urban districts), the commissioners, now the urban district council, are empowered to license "slaughter-houses and knackers' yards for slaughtering cattle." These sections are sanitary sections, and they only give power to license a place, not a person. Sect. 126 makes this clear; the place is licensed. Sects. 29—31 of the Public Health Acts Amendment Act, 1890, speak of the premises being licensed as slaughter-houses. Sect. 7, sub-s. 1, of that Act gives an appeal to quarter sessions from the refusal of such a licence. A licence to a building is not unknown; for instance, a church is licensed for marriages. Further, the sections of the Act of 1847 only apply to a place used for "slaughtering cattle," and it is clear from s. 131 that "slaughtering cattle" means slaughtering cattle for the food of man. The words "slaughtering cattle" must have the same meaning in s. 126 as they have in s. 131. The expression "knackers' yards" is used in s. 126 as well as "slaughter-houses," but in 1847 it may well have been that cattle were occasionally slaughtered at knackers' yards for the food of man. It was to meet that occasional use of a knacker's yard that the words were inserted. It is true that by s. 3 of the Act "the word 'cattle' shall include horses, asses, mules, sheep, goats and swine"; but that is only if there is nothing in the subject or context repugnant to such construction, and here there is. The quarter sessions purported to grant this licence under the Act of 1847, and the licence is bad because in the first place they had no power to grant a personal licence, and in the next place the Act does not apply to a knacker's yard which is not used for slaughtering cattle for human food. The Act of 1847 was not intended to interfere with the Act of 1786. If this view is not correct, and the Act of 1847 applies to knackers' yards where cattle are slaughtered which are not intended for human food, then the result will be that two licences will be required for a knacker's yard, one a personal licence under the Act of 1786 and the other a licence for the premises under the Act of 1847. It would be absurd to suppose that the Legislature intended that the quarter sessions, from whom the power to license was taken away in 1894, should still have that power on appeal. In *Goodwin* v. *Sale* (1) the Divisional Court held that a licence under the Towns

(1) [1907] 2 K. B. 278.

Improvement Clauses Act, 1847, was a personal licence, but in that case the building was used as a slaughter-house for human food, and the Knackers Act, 1786, was not cited. That case should not be followed.

*Macmorran, K.C.* (*Naldrett* with him), for the respondents. The first Act to consider is the Knackers Act, 1786, which for many years was the only Act dealing with slaughter-houses or knackers' yards. A licence under that Act was granted by quarter sessions; it was of general application to the whole country, and it remained in full force until 1858. The Towns Improvement Clauses Act, 1847, is a clauses Act, of no force in itself, and has to be incorporated by a special Act. The Local Government Act, 1858 (21 & 22 Vict. c. 98), by s. 45 incorporated the sections of the Act of 1847 dealing with slaughter-houses; it is an adoptive Act. The Act of 1847 as to slaughter-houses only operated in districts where the Local Government Acts were adopted; in other districts the Knackers Act, 1786, remained in full force. In 1875 the clauses of the Act of 1847 became operative in urban districts only. I contend that from the time when the Act of 1847 came into force in any district it superseded the Act of 1786, and that the provisions of the Act of 1847 alone applied in the present case. The Acts of 1786 and 1847 did not cover the same area, for the Act of 1847 only applied to urban districts. Under the Act of 1894 the jurisdiction of quarter sessions under the Act of 1786 was transferred to the district councils, and they acquired the authority to license knackers' yards. There was no appeal from a refusal to grant a licence until the Public Health Act, 1890, Part I. of which is general in its operation, and s. 7 applies to all districts and gives a right of appeal from any decision of a district council. The Knackers Act, 1786, applies only to rural districts; it is in effect repealed as to urban districts. Under the Act of 1786 the licence is both for the person and the place. It is a licence to carry on business in a particular place, which must be taken to be licensed for the purpose. In s. 125 of the Act of 1847 slaughter-houses and knackers' yards are both mentioned, and no limitation is placed on the slaughtering of cattle that it must be for use as human food. A licence granted under s. 126 of the Act of 1847 authorizes the use of the premises as a knacker's yard, and no licence under the Act of 1786 either for the person or the premises

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is required. Sect. 131 of the Act of 1847 is one of some difficulty; each of the sections 125 to 130 has used the expression "slaughter house or knacker's yard"; while in s. 131 the expressions used are entirely different. The explanation is that s. 131 was intended to apply only to places where cattle were slaughtered for the purpose of being used as butcher's meat. *Goodwin* v. *Sale* (1) is distinguishable; the circumstances were very different. If my construction of the sections is right, the respondents are entitled to a licence for the specified premises for a knacker's business. Under s. 7 of the Act of 1890 the quarter sessions had jurisdiction to entertain the appeal.

*Colam, K.C.*, in reply.

SWINFEN EADY L.J. This is an appeal by the defendants, the Barking Urban District Council, against an order of the Divisional Court discharging a rule nisi for a certiorari to bring up to be quashed a licence granted by quarter sessions to the respondents, the B. A. P., Limited, in respect of certain premises at Barking in Essex for the user of the premises as a knacker's yard. Application was made by the respondents to the Barking Urban District Council for a licence for that purpose. The licence was refused by the urban district council, whereupon the applicants (who are now the respondents) claimed the right to appeal to the quarter sessions against the refusal, and they appealed; and on the hearing at quarter sessions the view of the applicants prevailed and the licence was granted by the quarter sessions. The next step was that the urban district council applied for a certiorari to bring up to the King's Bench Division the licence granted by the quarter sessions upon the ground that the quarter sessions had not jurisdiction to entertain the matter or to grant the licence, and that no appeal lay to quarter sessions from the refusal of the urban district council to grant the licence in question.

The respondents, the B. A. P., Limited, are a corporation who are interested in the humane and proper disposal of animals, the killing and disposal of animals not intended for human food, whose carcases may be used for industrial purposes, and they applied for a licence to the urban district council, who had previously

(1) [1907] 2 K. B. 278.

granted a similar licence in respect of the same premises to a company called the Midland Cattle Products, Limited. The urban district council granted the licence to that company for one year from January 1, 1914, and the B. A. P., Limited, as successors in title to the premises in question, applied to the council for a similar licence, which was refused ; and it was from that refusal that the appeal was brought to quarter sessions.

The question is : Was the Divisional Court right in saying that an appeal from the refusal of the urban district council lay to quarter sessions, or was the determination of the urban district council final and without appeal ? That depends upon the construction of certain statutes, which are perhaps a little involved. We have to look back to the year 1786, in which year a statute, 26 Geo. 3, c. 71, was passed, entitled " An Act for regulating houses and other places kept for the purpose of slaughtering horses." The Act recites that, " whereas the practice of stealing horses, cows, and other cattle, hath of late years increased to an alarming degree ; and hath been greatly facilitated by certain persons of low condition, who keep houses or places for the purpose of slaughtering horses and other cattle : for remedy whereof, be it enacted that from and after the twentieth day of July, 1786, no person or persons shall keep or use any house or place, for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat or other cattle, which shall not be killed for butchers meat, without first taking out a licence for that purpose, at the general quarter sessions held for the county, riding, city, town, district, division or liberty, wherein such slaughtering house or place shall be situate." It is made clear that this licence is only required in respect of premises where slaughtering takes place, when the animals are not killed for butcher's meat, where they are not killed for human consumption. Then the statute further provides that the person to whom the licence is to be granted is to produce a certificate " under the hands and seals of the minister and churchwardens, or overseers, or of the minister and two or more substantial house-holders of the parish wherein the person or persons applying for such licence shall dwell, that such person or persons is or are fit and proper to be trusted." That is a certificate of character, and every licence is

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to be signed by the justices of the peace assembled at quarter sessions.

Then it deals in s. 2 with the person carrying on business: "All and every person and persons so licensed as aforesaid"—there it is to be observed that the section refers to the persons to be licensed—"shall cause to be painted or affixed over the door or gate of the house or place where he, she or they shall carry on the said business, in large legible characters, his, her and their name and names, with the words 'Licensed for slaughtering horses, pursuant to an Act passed in the twenty-sixth year of His Majesty King George the Third.'" Then the Act contains other provisions, including a certain notice that is to be sent to a person referred to as an inspector of horses intended to be slaughtered. It contains a provision that a record is to be kept by the person licensed, "and every person so licensed as aforesaid shall, at the time any horse," &c., "shall be brought for the purpose of slaughtering, make or cause to be made an entry in a book to be kept for the purpose in a fair legible hand" certain particulars which I need not read. So that a record is to be kept of them. Then it goes on: "All and every such licensed person or persons shall at all times attend with and produce such book before any one justice of the peace for the county, city, liberty or place where such licensed slaughtering house or place shall be situate." Then by s. 5, "Such of the parishioners as by law are entitled to meet in vestry for the purpose of choosing parish officers shall, in every parish wherein any such slaughtering house or place shall be situated, annually, or oftener, as occasion may require, appoint one or more proper person or persons to be an inspector or inspectors to inspect every such slaughtering house and place as aforesaid." Then by s. 8, persons slaughtering horses, &c., without a licence shall be deemed guilty of felony. It is not necessary to refer more in detail to the provisions of the Act beyond stating that it is obvious from the language of the statute to which I have shortly called attention that what the Act is providing for is a licence to certain persons to carry on business at certain premises. The premises are liable to inspection, and the person licensed has certain duties to carry out; so that the Act provides for both matters. It contemplates that the licence is only to be granted to a respectable person,

whose respectability is vouched for in manner provided for by the Act, and that it shall be a licence to slaughter at certain premises to be named and within the jurisdiction of the justices granting the licence.

Those are the general provisions of the Act which is referred to subsequently and recited as the Knackers Act of 1786. That statute was one of general application; it applied to the whole country. Power was vested in the justices in quarter sessions, either in counties or boroughs, as the case might be, and the Act continued to be the law governing the whole country with regard to the provision of knackers' licences down to the year 1847.

In that year was passed the Towns Improvement Clauses Act, 1847. This statute was not of general application. It was an adoptive statute, applying only to the places where it was adopted. By this statute provision was made for slaughtering houses; it says "with respect to slaughtering houses be it enacted as follows." I should say that prior to the provision of this statute there was no general law in force requiring the licensing or registration of slaughtering houses where animals were slaughtered for human food, for butcher's meat; there was no statute requiring any licence or qualification. The statute of 1847 provides that "with respect to slaughter-houses be it enacted as follows." By s. 125, "The commissioners may license such slaughter-houses and knackers' yards as they from time to time think proper for slaughtering cattle within the limits of the special Act." It will be observed that that provision applies to slaughter-houses and knackers' yards. Sect. 126 provides for new slaughter-houses and new knackers' yards: "No place shall be used or occupied as a slaughter-house or knacker's yard within the said limits which was not in use and occupation at the time of the passing of the special Act, and has so continued ever since, unless and until a licence for the erection thereof, or for the use and occupation thereof as a slaughter-house or knacker's yard, have been obtained from the commissioners." At that date they were the improvement commissioners, who are now represented by the urban district council. "And every person who, without having first obtained such licence as aforesaid, uses as a slaughter-house or knacker's yard any place within the said limits not used as such

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at the passing of the special Act, and so continued to be used ever since, shall for each offence be liable to a penalty not exceeding five pounds." That provision of s. 126 applies to new slaughter-houses and new knackers' yards. Then by s. 127 provision is made for existing slaughter-houses and existing knackers' yards. Existing slaughter-houses were unlicensed slaughter-houses, because no licence had ever been required, and the existing knackers' yards were knackers' yards which down to the passing of this Act had been licensed under the Act of 1786. By s. 127, "Every place within the limits of the special Act which shall be used as a slaughter-house or knacker's yard shall, within three months after the passing of such Act, be registered by the owner or occupier thereof at the office of the commissioners, and on application to the commissioners for that purpose the commissioners shall cause every such slaughter-house or knacker's yard to be registered in a book to be kept by them for that purpose; and every person who after the expiration of the said three months and after one week's notice of this provision from the commissioners uses or suffers to be used any such place as a slaughter-house or knacker's yard, without its being so registered, shall be liable to a penalty not exceeding five pounds for such offence." This provision required for the first time the registration of slaughter-houses, and it provides that every such place, that is, every new slaughter-house and every new knacker's yard that is used as a slaughter-house or knacker's yard, shall be registered. If such user takes place in premises not duly registered, then there is a penalty of 5*l.* for every offence. Then by s. 128 the commissioners have very wide powers with regard to by-laws. They may make by-laws for the licensing, registering, and inspecting of slaughter-houses and knackers' yards and preventing cruelty therein, and for keeping the same in a cleanly and proper state, and for removing filth at least once in every twenty-four hours, and for requiring them to be provided with a sufficient supply of water, and they may impose pecuniary penalties on persons breaking such by-laws. Now the matters so to be dealt with by by-laws are equally applicable to the user of knackers' yards for killing animals not intended for human food as to slaughter-houses where animals are being slaughtered for butcher's meat. Then by s. 129, "The

justices before whom any person is convicted of killing or dressing any cattle contrary to the provisions of this or the special Act, or of the non-observance of any of the by-laws or regulations made by virtue of this or the special Act, in addition to the penalty imposed on such person under the authority of this or the special Act, may suspend for any period not exceeding two months the licence granted to such person under this or the special Act." Then by s. 130 there is a penalty for slaughtering cattle during the suspension of the licence; and by s. 131 there is power that "the inspector of nuisances, the officer of health, or any other officer appointed by the commissioners for that purpose, may at all reasonable times, with or without assistants, enter into and inspect any building or place whatsoever within the said limits kept or used for the sale of butchers meat, or for slaughtering cattle." I think it is manifest that, according to the true construction of this statute, s. 131, having regard to what follows, is limited to a place kept or used either for the sale of butcher's meat, which would extend to a butcher's shop which would be kept for the sale of meat, or for slaughtering cattle, that is, slaughtering cattle intended to be used for human consumption. The whole context of s. 131 shows it, because there is power to enter and inspect carcases found there, and any carcases found to be unfit for the food of man the justices may order to be destroyed or disposed of; so it is manifest from the whole provisions of the section that it has reference only to the slaughtering of cattle for human food. In the previous section, where there is a penalty and where the justices may suspend the licence of the slaughter-house in addition, the penalty obviously extends as well to the user of the knackers' yards as to the user of an ordinary slaughter-house.

The comment upon those provisions is this. First, the statute was adoptive only, and it did not apply except in those districts where it was adopted. Where it was not adopted, the provisions of the Act of 1786 applied, but where in course of time the provisions of this statute were adopted, then I think that this statute, applying as it does both to the person licensed and to the premises in respect of which the licence is granted, must be taken to supersede the provisions of the Act of 1786, wherever this Act of 1847 was in force. It cannot be that a person who had obtained a licence for premises

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under the Act of 1847 was committing an offence under the Act of 1786 because he did not also obtain a licence under that statute. I think the true view is, not that the Act of 1786 applied to persons only and the Act of 1847 to premises only, but that, with regard to each statute, the statute shows that it applied both to the person licensed and to the premises in respect of which the licence was granted, and that the true view is that the much more elaborate provisions contained in the Act of 1847, which were only applicable to certain populous areas, superseded, where they were adopted, the provisions of the Act of 1786. By s. 169 of the Public Health Act, 1875, the provisions of the Act of 1847 with regard to slaughter-houses were incorporated, so far as regards urban districts, of which Barking is one.

Now in the Public Health Act, 1875, slaughter-houses are defined: "'Slaughter-house' includes the buildings and places commonly called slaughter-houses and knackers' yards, and any building or place used for slaughtering cattle, horses, or animals of any description for sale." So that it includes knackers' yards and slaughter-houses properly so called, together with any building or place used for slaughtering cattle, horses, or other animals of any description for sale. Then by s. 169 of that statute, "Any urban authority may, if they think fit, provide slaughter-houses, and they shall make by-laws with respect to the management and charges for the use of any slaughter-houses so provided. For the purpose of enabling any urban authority to regulate slaughter-houses within their district the provisions of the Towns Improvement Clauses Act, 1847, with respect to slaughter-houses shall be incorporated with this Act." So that as and from this date, in respect to urban districts, the provisions of the Act of 1847 were incorporated by virtue of the provisions of the Public Health Act, 1875. The power became vested in the urban authority. Then in the year 1890 was passed the Public Health Act of that date, and by s. 7, which is contained in Part I. of the Act, which part is of universal application and does not depend upon its being adopted, "any person aggrieved (*a*) by any order, judgment, determination, or requirement of a local authority under this Act; (*b*) by the withholding of any order, certificate, licence, consent, or approval, which may be made, granted, or given by a local authority under this Act;

(c) by any conviction or order of a Court of summary jurisdiction under any provision of this Act; may appeal in manner provided by the Summary Jurisdiction Acts to a Court of quarter sessions." Then the B. A. P. Company say that they duly applied for a licence under the Public Health Act, 1875, with which the Act of 1847 is incorporated, and under the subsequent Act of 1890, and that the licence was refused by the urban district council, and then they claim the right under s. 7 of the Act of 1890 to appeal in manner provided by the Summary Jurisdiction Acts to the Court of quarter sessions. They did appeal, and upon the merits of the case they were successful in obtaining this licence.

In my opinion they were entitled so to appeal under the statute to which I have referred. The licence for which they applied was one which, under the provisions of the Act of 1847, incorporated in the Acts of 1875 and 1890, the urban district council had the power to grant, and upon their refusal to grant which the appellants were entitled to appeal to quarter sessions. Then it was urged that, having regard to the provisions of the Local Government Act, 1894, which transfers to, amongst others, urban district councils the powers, duties, and liabilities with regard to knackers' licences which were then vested in the quarter sessions, it could not be intended that there should be an appeal to quarter sessions in respect of this matter. It was not the sole purpose of the Local Government Act to transfer these powers, duties, and liabilities to urban district councils; it also transfers them to other bodies, and as regards the other bodies the transference of the powers then remaining alive under the Knackers Act, 1786, was effective. Any question as to the effect of the Act of 1894 upon licences under the Act of 1786 in urban districts is outside this appeal, because this is an appeal from the refusal to grant a licence under the provisions of the Acts of 1875 and 1890. Mr. Colam, however, urged upon us that it was not expedient to leave open the question as to whether any additional licence under the Knackers Act, 1786, would also be required by the B. A. P. Company. In my judgment that additional licence is not necessary. In urban districts governed by the provisions of the Public Health Acts, 1875 and 1890, having regard to the incorporation in the Act of 1875 of the provision with regard to slaughter-houses first introduced

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by the Towns Improvement Clauses Act, 1847, where a licence is granted under the provisions of those statutes, a further licence to the person under the Act of 1786 is unnecessary.

Some question was raised as to the form of the licence, but I do not think any objection can be taken to the form. It is a licence to the B. A. P. Company in respect of the particular premises, and granted in this form it appears to follow exactly the form that was used when the licence to their predecessors was granted. Under these circumstances I am of opinion that the judgment of the Divisional Court was right and that the appeal fails.

PHILLIMORE L.J. I am of the same opinion. The question turns upon whether the licence sought for and granted was to be deemed to have been granted under the Public Health Act, 1875, as amended by the Public Health Act, 1890, incorporating the Towns Improvement Clauses Act, 1847, or under the Knackers Act, 1786. I think it was granted under the former. If it was, an appeal clearly lies to quarter sessions under s. 7 of the Act of 1890, and the order was made by quarter sessions in exercise of the jurisdiction which belonged to them, and there is no case for certiorari, subject to the question of form, with which I will deal later.

Going back to the Towns Improvement Clauses Act, 1847, it is said that ss. 125 to 130 apply to knackers' yards properly so called as well as to slaughter-houses and give a new jurisdiction and a new power to a new body, where the Act is adopted or introduced, other than the body which had power under the Knackers Act, 1786. There are difficulties in that contention. It would look as if under s. 125 there was power to consider the character of a person to be licensed, and having regard to what one knows was one of the principal objects of the old Knackers Act, 1786, which was kept in force by the Act 7 & 8 Vict. c. 87, and indeed sharpened by that Act, one would not expect that a jurisdiction in respect of licensing knackers' yards should be limited to considering the goodness or propriety of the yard and have no reference to the person. But it has been pointed out in the course of the argument that not only the language of s. 129, which speaks of a licence granted to a person, but all the penal provisions of s. 129 seem to show that the character of the person to be licensed must be taken into consideration, or at

any rate may be taken into consideration, as well as the character of the place. Then, again, it has been said that there is the difficulty about reconciling the language about slaughtering cattle in s. 125 with that about slaughtering cattle in s. 131. There is no doubt that in s. 131 the phrase " slaughtering cattle " means slaughtering cattle for human food, and at first sight one would expect it to have the same meaning as in s. 125, and in that case the knacker's yard would not be such a knacker's yard as we are accustomed to call by that name, but would be only another form of slaughter-house. I think the answer is that the context in s. 131 requires the limitation of the more general language about slaughtering cattle which, as general language, is equally applicable to a knacker's yard or to a slaughter-house. A third objection, which is also a powerful one, is that the old knacker's yard by the effect of s. 126 would apparently cease to require to be licensed. The only licensing authority in the district would be the urban district council, which would license under s. 125 and would not license under the old Act, and which is not allowed to require old slaughter-houses or knackers' yards to seek for a licence. They are in s. 126 to be deemed to be immune from the jurisdiction to that extent of the urban district council. And it does seem that the effect is that an old knacker's yard may be carried on, although it has ceased to be licensed. But it will not be carried on without control: it has got under s. 127 to be registered, and under s. 128 by-laws may be made for its regulation, and under s. 129 its registration may be suspended or taken away, if the people in control of it misconduct themselves. Therefore in that way answers can be made to all the difficulties, serious as they are, in applying this fasciculus of clauses to knackers' yards properly so called as well as slaughter-houses. On the other hand, it is almost impossible to give any meaning to knackers' yards except that they are knackers' yards, and almost impossible to say that the sections, each of them referring to knackers' yards, do not do so, particularly as we know that the technical title " knacker," as applied to this class of thing, had been confirmed by a not very long previous statute, the Act of 7 & 8 Vict. c. 87, to which I have already referred. Therefore I come to the conclusion that where the Towns Improvement Clauses Act, 1847, either by adoption or under the specific provisions of the Act of 1875, is in operation, those who

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represent the commissioners under the original Act, the urban district council, have the power of licensing, and that the licence which they grant is a licence both of the person and of the place; and it is with some satisfaction that I come back to the conclusion, which I confess at one time I rather hesitated about, that the case of *Goodwin* v. *Sale* (1), to which I was a party, was apparently rightly decided and that these licences are licences to persons as well as to places. If that be so, then this appeal to the quarter sessions was rightly brought and the quarter sessions had jurisdiction to grant the licence in the form in which they granted it. I take the form to be a licence to a person in a place—what has been called a double-barrelled licence. I think this is the effect of s. 8 of the Towns Improvement Clauses Act, 1847, and, this being the case, the licence under the Knackers Act, 1786, which was also a licence in respect of person and place, is not required, because when the Towns Improvement Clauses Act, 1847, prevails the Knackers Act, 1786, is superseded.

Just one word upon that Act. I have myself no doubt that in the Act that which unquestionably was a licence of the person was also a licence of the place. The title of the Act is "An Act for regulating houses and other places kept for the purpose of slaughtering horses." The expression "licensed houses" occurs more than once, and ss. 3, 4, and 5 evidently deal with a particular place which is the place in respect of which the licence is to be granted. Under the Towns Improvement Clauses Act, 1847, that which is most prominent is the licensing of a place; under the Knackers Act, 1786, that which is most prominent is the licensing of a person; but in both cases it is a licence of the person and of the place. That being so, this licence was right in form and no other licence could be required under the Act of 1786. The Act of 1890 is rather broader in its terms than is necessary where it applies. Where quarter sessions still have power to license knackers and knackers' yards under the Act of 1786 (as they still have power in rural districts or in rural districts which have not succeeded in adopting the Towns Improvement Clauses Act, 1847,) the power which previously belonged to the quarter sessions has been transferred from the sessions to the district council. Apparently under s. 7 of the Act of 1890 this is

(1) [1907] 2 K. B. 278.

subject to an appeal back to the quarter sessions; but it is not necessary to decide the point.

Only one other word. If this had been a licence under the Act of 1786, I can well conceive that, having regard to the language of that Act, there might be an objection to its being granted to a corporation; but being a licence under the other series of Acts, there seems to me no objection to its being granted to a corporation.

BANKES L.J. I agree. The question in this appeal is whether or not the respondents had a right of appeal to the quarter sessions from the refusal of the urban district council to grant them a licence for a knacker's yard for which they had applied. The answer to that question depends upon what is the proper construction to be placed upon what I think I may fairly describe as a tangled and confusing mass of legislation. After the very full discussion which this case has had it seems to me impossible to say that there are not great difficulties in accepting the contention on the one side or on the other. It is admitted that if the urban district council were rightly acting under the Towns Improvement Clauses Act, 1847, in dealing with this licence there would be an appeal from their decision; but it was contended that they either were not acting under that Act, or that they had no right to act under it, and that there was consequently no right to appeal, because if the proceedings were under the old Knackers Act, 1786, there would be no right of appeal.

Mr. Colam's first point was this: he said that the Towns Improvement Clauses Act, 1847, does not deal at all with knackers' yards; it deals only with places where animals are killed for human food; and that although the statute uses the words "knackers' yards" in conjunction with the words "slaughter-houses," when you read the whole group of sections you must read both expressions as referring to the killing of animals for use as human food; and if he could have established that, he would have established his position.

I quite appreciate the argument as to the language used in s. 131, but in my opinion the language used in the earlier sections is so plain and so strong that it is impossible to accept the construction contended for. In my opinion the statute must be read as including both slaughter-houses and knackers' yards irrespective of the

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question of whether in the knackers' yards the animals are being killed for human food or not; and s. 131 must be read as dealing with a separate matter altogether, that is, the inspection of meat required for human food. The next point taken was this: If that is so, the Towns Improvement Clauses Act, 1847, deals only with premises, and the Knackers Act, 1786, deals with persons. The one is what may be called a health Act, the other a police Act; and even if the first contention is wrong, the proper interpretation to be put upon the statute is that a person before he can lawfully use a knacker's yard must obtain a licence for the premises under the Towns Improvement Clauses Act, 1847, and for himself under the old Knackers Act, 1786. On the other hand it is contended: No, the true construction of this series of statutes is that in any and every case where the Towns Improvement Clauses Act, 1847, has been applied the proper authority to deal with knackers' licences is the authority of the district, and, that being so, the statutes must be read as superseding the old Knackers Act, 1786, in respect of any districts to which the Towns Improvement Clauses Act, 1847, applies. Now, as I have said, it seems to me that there are great difficulties in the way of accepting either proposition. I am not going through them all, but the greatest difficulty to my mind in the way of accepting Mr. Macmorran's contention is due to the provisions of the Local Government Act, 1894, a quite recent statute, which provided that as from the appointed day the powers of quarter sessions in relation to the licensing of knackers' yards within a county district should be transferred to the district council of the district; and Mr. Macmorran admits that that includes the conferring upon urban district councils of a power which, according to the contention, they have had for a very great many years, and that is one of the difficulties in his way. On the other hand, it seems to me essential in order to establish Mr. Colam's contention that two matters should be established: first of all, that the old Knackers Act, 1786, relates purely to a personal licence to the individual, and that the Towns Improvement Clauses Act, 1847, relates solely to a licence to the premises. I think, if that could have been established, the proper construction would have been to read this legislation as providing for the two classes of licence, and that the two classes co-exist, the one granted for police purposes by the one authority and the

other granted for sanitary purposes by the other authority. But when one comes to look into these statutes carefully, it seems to me plain that, although the Knackers Act, 1786, deals primarily, if I may use the expression, with the person and with the personal character of the applicant, it deals also with the premises where the permission granted by the licence is to be exercised, and it contemplates and deals with not only the person to be licensed, but also with the place where he carries on the business as licensed premises. And so also when you come to consider the Towns Improvement Clauses Act, 1847, it is plain that the statute, though dealing primarily with the premises, deals also with the person. And when once you find two sets of statutes dealing both with the person and the premises, the same person and the same premises in the same district, it seems to me impossible to adopt the construction which leads to the conclusion that both statutes are operative in the same district with regard to the same premises. After the full consideration this case has had, although my mind has fluctuated a good deal as to what the proper result should be, I have clearly come to the conclusion after hearing the whole matter that the contention put forward on behalf of the respondents is the correct one, and that in districts to which the Towns Improvement Clauses Act, 1847, applies the proper authority to deal with the licence is the urban district council, and the machinery which is to be adopted and applied is the Towns Improvement Clauses Act, 1847, and not the Knackers Act, 1786.

*Appeal dismissed.*

Solicitor for appellants: *Douglas H. Wiseman, Barking.*

Solicitors for respondents: *Lee, Ockerby & Everington, for R. Vaughan Gower, Tunbridge Wells.*

NOTE.—Knackers Act, 1786 (26 Geo. 3, c. 71):—

Sect. 1: "No person or persons shall keep or use any house or place, for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, which shall not be killed for butchers meat, without first taking out a licence for that purpose, at the general quarter sessions held for the county . . . . wherein such slaughtering house or place shall be situate; and the justices of the peace, at the general quarter sessions

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assembled, are hereby authorized and empowered to grant such licences as aforesaid, upon a certificate, under the hands and seals of the minister and churchwardens, or overseers, or of the minister and two or more substantial householders of the parish wherein the person or persons applying for such licence shall dwell, that such person or persons is or are fit and proper to be trusted with the management and carrying on such business as aforesaid . . . ."

Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34):—

"And with respect to slaughter-houses, be it enacted as follows:—"

Sect. 125: "The commissioners may license such slaughter-houses and knackers' yards as they from time to time think proper for slaughtering cattle within the limits of the special Act."

Sect. 126: "No place shall be used or occupied as a slaughter-house or knacker's yard within the said limits which was not in such use and occupation at the time of the passing of the special Act, and has so continued ever since, unless and until a licence for the erection thereof, or for the use and occupation thereof as a slaughter-house or knacker's yard, have been obtained from the commissioners; and every person who, without having first obtained such licence as aforesaid, uses as a slaughter-house or knacker's yard any place within the said limits not used as such at the passing of the special Act, and so continued to be used ever since, shall for each offence be liable to a penalty . . . ."

Sect. 127: "Every place within the limits of the special Act which shall be used as a slaughter-house or knacker's yard shall, within three months after the passing of such Act, be registered by the owner or occupier thereof at the office of the commissioners, and on application to the commissioners for that purpose the commissioners shall cause every such slaughter-house or knacker's yard to be registered in a book to be kept by them for that purpose; and every person who after the expiration of the said three months, and after one week's notice of this provision from the commissioners, uses or suffers to be used any such place as a slaughter-house or knacker's yard, without its being so registered, shall be liable to a penalty . . . ."

Sect. 131: "The inspector of nuisances, the officer of health, or any other officer appointed by the commissioners for that purpose, may at all reasonable times . . . . enter into and inspect any building or place whatsoever within the said limits kept or used for the sale of butchers meat, or for slaughtering cattle, and examine whether any cattle, or the carcase of any such cattle, is deposited there; and in case such officer shall find any cattle, or the carcase or part of the carcase of any beast, which appears unfit for the food of man, he may seize and carry the same before a justice, and such justice shall forthwith order the same to be further inspected and examined by competent persons; and in case, upon such inspection and examination, such cattle, carcase, or part of a carcase be found to be unfit for the food of man, such justice shall order the same to be immediately destroyed or otherwise disposed of . . . . and such justice may adjudge the person to whom such cattle," &c., "belongs, or in whose custody the same is found, to pay a penalty not

exceeding 10*l.* for every such animal or carcase or part of a carcase so found; and the owner or occupier of any building or place kept or used for the sale of butchers' meat, or for slaughtering cattle . . . . who obstructs or hinders such inspector or other officer from entering into and inspecting the same, and examining, seizing, or carrying away any such animal or carcase or part of a carcase so appearing to be unfit for the food of man, shall be liable to a penalty . . . ."

Public Health Act, 1875 (38 & 39 Vict. c. 55):—

Sect. 169: "Any urban authority may, if they think fit, provide slaughter-houses, and they shall make by-laws with respect to the management and charges for the use of any slaughter-houses so provided."

"For the purpose of enabling any urban authority to regulate slaughter-houses within their district, the provisions of the Towns Improvement Clauses Act, 1847, with respect to slaughter-houses shall be incorporated with this Act."

Sect. 4: "In this Act, if not inconsistent with the context . . . . 'slaughter-house' includes the buildings and places commonly called slaughter-houses and knackers yards, and any building or place used for slaughtering cattle, horses, or animals of any description for sale."

Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59):—

Sect. 2: "(1.) This Act shall be construed as one with the Public Health Acts."

Sect. 29: "Licences granted after the adoption of this part of this Act for the use and occupation of places as slaughter-houses shall be in force for such time or times only, not being less than twelve months, as the urban authority shall think fit to specify in such licences."

Sect. 7: "(1.) Any person aggrieved—

"(*a*) by any order, judgment, determination, or requirement of a local authority under this Act;

"(*b*) by the withholding of any order, certificate, licence, consent, or approval, which may be made, granted, or given by a local authority under this Act; . . . .

may appeal in manner provided by the Summary Jurisdiction Acts to a Court of quarter sessions . . . ."

Local Government Act, 1894 (56 & 57 Vict. c. 73):—

Sect. 27: "(2.) As from the appointed day, the powers, duties, and liabilities of quarter sessions in relation to the licensing of knackers' yards within a county district shall be transferred to the district council of the district."

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*June* 9.

[IN THE COURT OF APPEAL.]

## LEISTON GAS COMPANY *v.* LEISTON-CUM-SIZEWELL URBAN DISTRICT COUNCIL.

[1915 L. 1916.]

*Contract—Lighting of Streets—Supply of Gas and Lamps—Inclusive Flat Rate—Order restraining Lighting—Contract impossible of Performance—Frustration of Adventure—Liability for Rate—Condition Precedent—Defence of Realm Regulations*, 1914.

The plaintiffs contracted with the defendants to light their district for five years from August, 1911. The plaintiffs were to provide gas standards, lamps, and other plant, to connect the same with their mains in the district, to supply gas and to light, extinguish, clean, and repair the lamps, and maintain the plant during the term. The defendants were to pay an inclusive fixed sum per lamp per annum, payable in four equal quarterly instalments, to cover the cost of the gas and the cost of providing the necessary plant. In January, 1915, the contract having so far been performed by both parties, an Order made by the competent military authority under the Defence of the Realm Regulations, 1914, prohibited until further order the lighting of the street lamps. The plaintiffs sued for the three quarterly instalments that fell due after the date of the Order. The defendants denied their liability on the ground that the Order rendered the contract illegal and impossible of performance:—

*Held*, affirming the decision of Low J., that the defendants were liable, for the Order did not render the contract once for all wholly illegal or impossible of performance, and that the consideration for the plaintiffs' services could not be apportioned.

*Held*, also, that the supply of gas was not a condition precedent to the plaintiffs' right to recover the quarterly payments.

Appeal from the decision of Low J.; reported [1916] 1 K. B. 912.

The following statement of facts, taken substantially from the judgment of Lord Reading C.J., is sufficient for the purposes of this appeal:—

The plaintiffs are a gas company, and the defendants are the local authority for the district of Leiston. By a contract made between the plaintiffs and the defendants, and dated June 2, 1911, it was agreed: (1.) that the contract should be for five years from August 1, 1911, and should remain in force until determined by either party giving six calendar months' notice expiring on July 31,

1916, or July 31 in any subsequent year; (2.) that the plaintiffs should provide 105 column lanterns and burners, and connect them to their mains by August 1, 1911, the plant to remain the property of the plaintiffs; (3.) that during the continuance of the contract the plaintiffs should supply gas and light, extinguish, clean, repair, paint, and maintain the lamps; (4.) that the defendants should pay to the plaintiffs 1*l.* 7*s.* 6*d.* per lamp per annum for each of the 101 lamps extinguished at 11.15 P.M. and 3*l.* 7*s.* 6*d.* for each of the four lamps burning all night, the payments to be made in equal quarterly instalments. By an Order made under the Defence of the Realm Regulations, 1914, by the competent military authority for the purpose of darkening the streets at night owing to the exigencies of war, none of the lamps except twenty-six were lighted during the first twenty-six nights of the first quarter in 1915. Thereafter during the remainder of the quarter, and the two subsequent quarters, the military authority decided that the streets must be in complete darkness, and issued an Order forbidding the lighting of any lamps, and none were lighted.

In November, 1915, the plaintiffs sued the defendants for the quarterly payments due March 31, June 30, and September 30, 1915, respectively. The defendants denied liability on the ground that the contract had become impossible of performance, or, alternatively, that the plaintiffs had not performed the services to be rendered in consideration of the quarterly payments.

The action came for trial before Low J., who gave judgment for the plaintiffs. He held that the contract was not only a contract to furnish light, but also a contract to furnish the necessary plant for a given period; that it was impossible to distinguish in the amount agreed to be paid per lamp how much was deferred payment spread over the period for furnishing the plant and how much was for the actual gas supplied; and that the Order suspending the lighting had not rendered the contract absolutely unlawful or its further performance once for all impossible.

The defendants appealed.

*Hawke, K.C.*, and *A. H. Poyser*, for the appellants. The basis of this contract is illumination by the supply of gas. The Order prohibiting the lighting of the streets has made the contract illegal

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and impossible of performance: *Baily* v. *De Crespigny*. (1) The act of the Executive is an interference which covers the whole of the remaining period of the contract and renders it impossible. Both parties are therefore absolved from the contract, which is at an end. The distinction between an event which causes a temporary interference with a contract and an event which renders the performance of the contract impossible is pointed out in *Andrew Millar & Co.* v. *Taylor & Co.* (2) The fact that the contract is partly executed and partly executory makes no difference when the performance of the contract becomes impossible: *Horlock* v. *Beal* (3); *St. Enoch Shipping Co.* v. *Phosphate Mining Co.* (4) We are being sued for illumination that we shall never have. The plaintiffs may be ready and willing to supply, but are not able to supply. The commercial adventure is frustrated: *Taylor* v. *Caldwell* (5); *Krell* v. *Henry* (6); *Distington Hematite Iron Co.* v. *Possehl & Co.* (7) Lastly, the supply of gas for lighting is a condition precedent to the plaintiffs' right to recover payment of the instalments. We are ready and willing to pay, but they cannot supply.

*J. B. Matthews, K.C.*, and *Rayner Goddard*, for the respondents. The doctrine of frustration of adventure has always been limited to commercial and mercantile contracts, and does not apply to a contract of this character.

[LORD READING C.J. Does it not? Surely this is a commercial adventure?]

There is a distinction in the cases where the event wholly prevents the fulfilment of the contract and where it causes only a temporary interruption of the contract: *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (8); *Scottish Navigation Co.* v. *W. A. Souter & Co.* (9); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (10); *Krell* v. *Henry* (11); *Chandler* v. *Webster* (12); *Hadley* v. *Clarke* (13); *Grimsdick* v. *Sweetman*. (14) Here the Order restraining

(1) (1869) L. R. 4 Q. B. 180, 187.
(2) [1916] 1 K. B. 402.
(3) [1916] 1 A. C. 486, 496.
(4) [1915] W. N. 197.
(5) (1863) 3 B. & S. 826.
(6) [1903] 2 K. B. 740.
(7) [1916] 1 K. B. 811.
(8) [1916] 1 K. B. 429, 437.
(9) [1916] 1 K. B. 675, 681.
(10) [1915] 3 K. B. 668, 675; on appeal, [1916] 1 K. B. 485, 491.
(11) [1903] 2 K. B. 740, 750.
(12) [1904] 1 K. B. 493.
(13) (1799) 8 T. R. 259, 266.
(14) [1909] 2 K. B. 740, 744.

lighting did not render the contract wholly impossible of performance by both parties. There is no event here which has wholly determined the contract, but only an interference with the lighting for a time. The restriction against lighting might have been removed at any time. Under the contract we were preserving and maintaining the installation of the standards and lamps, and were ready and able to supply gas until the defendants recently gave notice determining the contract. The principle of *Loates* v. *Maple* (1) and *London and Northern Estates Co.* v. *Schlesinger* (2) applies. *Baily* v. *De Crespigny* (3) was a case in which the contract was rendered wholly impossible. There has not been a total failure of the consideration on our part. We are not suing for gas sold and delivered, but for the fixed instalments for gas and for maintaining the installation of standards and lamps, and the defendants cannot apportion any part of the payment to gas. If we have not supplied gas their remedy is to sue us for damages : *Pordage* v. *Cole.* (4)

*Hawke, K.C.*, in reply.

*Cur. adv. vult.*

June 9. The following written judgments were delivered :—

LORD READING C.J. stated the facts and proceeded :—The defendants contend that the contract must be regarded as one made for the public lighting of the district, and that as the military authority prohibited the lighting of the lamps for this purpose, the contract became impossible of performance : first, because its performance would be unlawful ; and, secondly, because the object of the venture was frustrated, or, to adopt the language sometimes used, the foundation of the contract had gone. There is no doubt that when a party contracts to perform an act, lawful at the time of the making of the contract, which thereafter becomes impossible of performance by reason of a change in the law, he is discharged from the obligation under the contract : *Baily* v. *De Crespigny.* (3) Again, the law is well settled that where the performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract, the contract is to be

(1) (1903) 88 L. T. 288.
(2) [1916] 1 K. B. 20.
(3) L. R. 4 Q. B. 180.
(4) (1670) 1 Wms. Saund., 7th ed., p. 552.

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construed as "subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor": per Blackburn J. in *Taylor* v. *Caldwell*. (1) This principle is not confined to the cessation of the existence of the subject-matter of the contract, but applies equally "to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract": *Nickoll & Knight* v. *Ashton, Edridge & Co.* (2); *Krell* v. *Henry*. (3) Another well-known illustration of this principle of the common law is that of the charterer of a vessel who was excused from the obligation of loading her on the ground that the delay in the arrival of the vessel had made the stipulated voyage commercially impossible, and consequently had frustrated the object of the venture: *Jackson* v. *Union Marine Insurance Co.* (4) The law upon this subject was considered recently in the House of Lords in *Horlock* v. *Beal* (5) and was summarized by Lord Wrenbury, who said: "Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding." It is often difficult, when applying the principle above stated, to determine on which side of the line the particular case falls. The decision in this case must depend on the true effect of the contract. Under the contract the plaintiffs undertook to perform various services for the defendants in return for an agreed rate of payment to be made

(1) 3 B. & S. 826, 833.
(2) [1901] 2 K. B. 126.
(3) [1903] 2 K. B. 740, 748.
(4) (1874) L. R. 10 C. P. 125.
(5) [1916] 1 A. C. 486, 525.

quarterly by the defendants for every quarter in the five years duration of the contract. These services included the provision and erection and maintenance of the column lamps and other plant for the supply of gas as stipulated, and the defendants agreed to make these payments extending over five years as the remuneration to the plaintiffs, not only for supplying and lighting the gas for the lamps, but also for providing and erecting and maintaining the plant. In fact the plaintiffs had performed the various services under the contract for nearly three and a half years before the event under discussion happened. The column lamps remain their property under the contract, and the defendants have had the advantage of them throughout the three and a half years. They have used them even in the three quarters of 1915, not indeed to the full extent, as the lamps were not lighted except for the twenty-six days of the first quarter, but to the extent that they remained there connected with the main and would be lighted whenever the prohibition by the military authority was relaxed or withdrawn. Upon these facts I cannot hold that the performance of the contract had become unlawful, or that the venture was frustrated by the act of the Executive in forbidding the lighting of the lamps. Part of the performance of the contract had become unlawful, but another part of the contract, which cannot be regarded as a trivial part, was lawful and could be performed. In these circumstances the defendants are not justified in treating the contract as at an end, or in refusing to make the payments as agreed by them.

The defendants further contend that the supply of gas and the lighting of the lamps is a condition precedent to the plaintiffs' right to recover the quarterly payments. The answer to this contention depends upon the intention of the parties to be collected from the instrument and the circumstances legally admissible in evidence, with reference to which it is to be construed: per Parke B. in *Graves* v. *Legg* (1), and quoted by Blackburn J. in *Bettini* v. *Gye*. (2) The observations I have already made upon the facts of the present case demonstrate that in my judgment this alternative contention of the defendants must fail. It was not intended that the supply of gas should be a condition precedent to the right to recover the quarterly payments. Under the contract there is an inclusive

(1) (1854) 9 Ex. 709, 716. (2) (1876) 1 Q. B. D. 183, 186.

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payment for all the services, and the consideration cannot be apportioned. The parties might have agreed the payment for each service, but they have preferred to agree to quarterly payments for the whole service extending over five years. Parke B. in *Graves* v. *Legg* (1) states the well-acknowledged rule of law that "where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." I hold that the contract by the plaintiffs to supply the gas is to be regarded as an independent contract and not as a condition precedent. The defendants have received part of the consideration, and if the plaintiffs had been in default the defendants could have recovered compensation for the failure to supply the gas and light the lamps: *Pordage* v. *Cole*. (2) The plaintiffs were not in default, and therefore the defendants cannot recover on a cross-claim for damages, but as the supply of gas by the plaintiffs was not a condition precedent to the right to recover, the defendants cannot justify their refusal to make the quarterly payments under the contract. Accordingly I come to the conclusion that this appeal should be dismissed.

WARRINGTON L.J. The plaintiffs are a gas company. They sue the defendants, an urban district council, for three quarterly payments due under a contract made in 1911 for the lighting of the council's district. The defendants contend that owing to the action of the military authority in forbidding the lighting of street lamps in their district they are discharged from their liability to pay. The learned judge has rejected the defence. The defendants appeal. The defendants' principal contention, and, as I think, the only one capable of being put forward with any prospect of success, is that, the lighting of their district having been rendered illegal, the foundation of the contract is gone, and the object with which it is made is entirely frustrated, with the legal consequence that the contract is avoided and each party discharged from his obligations thereunder. If the defendants could establish in fact the destruction of the foundation of the contract or the entire frustration of its object the legal consequence would in my judgment follow. The real question I think is, are the necessary facts established in

(1) 9 Ex. 709, 716. (2) 1 Wms. Saund., 6th ed., pp. 319l, 320e.

this case? The material facts are as follows: [The learned judge stated them and continued:] There are certain points to be noted about the contract. The plaintiffs undertake the whole of the matters incident to public lighting, that is to say, the provision and maintenance of the lamps, their connection with the main involving the supply of gas and the maintenance and cleansing of the appliances, including the due supply of burners and so forth. For this they are to be paid an annual sum by equal quarterly payments. The sum is measured by the number of lamps and is uniform for them all, with the exception of four which burn all night. It is an annual sum payable by equal quarterly payments, that is to say, not by payments varying according to the quantity of gas likely to be consumed in each particular quarter. It covers and is the remuneration for the entire service to be performed by the plaintiffs, and no particular part is attributed to any particular item of that service. It follows, I think, that failure to supply in a particular quarter any one of those items would not be a condition precedent to the recovery of the quarterly payment. But if such failure amounted to a breach of contract the remedy must be in damages. The contract cannot be divided into a number of quarterly contracts. If the contract then remains subsisting the defendants cannot, in my opinion, rest their defence on the failure of the plaintiffs during the periods in question to light the district in the manner contemplated by the contract. But the contention is that the contract has been avoided altogether and both parties are discharged from their obligations as the result of what the defendants say is the destruction of the foundation of the contract, or, to put the same idea into other words, the entire frustration of its object. Whether this event has taken place is a question of fact and must, I think, be answered in the negative. The effect of the action of the Executive is to render unlawful so long as the present Orders remain in force, which may be for the continuance of the war or a shorter period, the lighting of the street lamps. This renders impossible of performance only one of the services provided for by the contract, namely, the actual lighting and extinguishment of the lamps. It is still lawful for the plaintiffs to perform, and they remain bound to perform, all their other obligations, including the maintenance of the connection of the lanterns with the mains whereby the supply of

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gas could be at once resumed so soon as the prohibition is wholly or in part removed.

Looking at it from another point of view, it may be said that the plaintiffs are able and willing to keep up the supply of gas and in fact do so, but by the action of the authorities the defendants are prevented from making use of it when supplied. Moreover, for three and a half years the defendants have had the benefit of the entire services contracted for, including the expenditure of money in providing plant. The parties have not thought fit to provide a separate charge for the supply of gas, but have chosen to adopt an inclusive payment. Under these circumstances I find it impossible to come to the conclusion that the foundation of the contract has been destroyed or its object frustrated. No doubt the public lighting is for the time in abeyance, but this is not in my opinion enough to avoid altogether such a contract as the present with the result of relieving the defendants from making a payment a large part of which at all events must have been earned. I think the inability to enjoy all they pay for is a loss which must fall on the defendants. In my opinion the judgment of Low J. was correct and ought to be affirmed.

SCRUTTON J. An action was brought by the Leiston Gas Company, Limited, whom I call "the gas company," against the Leiston Urban District Council, whom I call "the council," to recover 157*l.* 15*s.*, being three quarterly payments due from the council under an agreement dated June 2, 1911. The defendants alleged that the agreement was for the supply of lighted gas lamps, and that, under Orders from a competent military authority acting under the Defence of the Realm Act and Regulations, such lamps could not be lighted for more than half the first quarter, and for the whole of the second and third quarters sued for. Low J. held this was no defence and gave judgment for the plaintiffs, the gas company. The defendants, the council, appeal to this Court. The case raises questions of general importance and some difficulty. It is necessary first to appreciate exactly what the agreement sued under provides. It is a contract to last for five years from August 1, 1911, and thereafter till determined by six months' notice terminating on July 31 of any year after and including 1916. The gas company are to

provide 105 gas standards and burners with automatic lighters, which remain their property, and to connect them with their mains, and to supply gas and incandescent mantles and chimneys for and light, extinguish, clean, repair, paint, and maintain the said lamps. The lamps are to be lit every night between certain hours varying with sunset and sunrise except on bright moonlight nights. The council is not to pay in proportion to gas supplied, but pays an annual rate for each of the lamps contracted for, reduced on a scale if the gas company reduce their charge for gas. The annual sum is payable quarterly. The quarterly payment, therefore, does not immediately depend on gas supplied ; it is the same in the winter and summer quarters, and the same whether the quarter contains many or few bright moonlight nights. It includes an unapportioned sum for supply and maintenance of plant. The gas company are liable for damages or penalty (both words are used) for each lamp they fail to light on any night when it ought to be lit unless the failure is due to circumstances beyond their control ; and the parties provide that if there is delay in starting the lamps on August 1, 1911, the penalty shall not apply, but the quarterly payment shall be reduced pro rata. They make no express provision for any reduction from the quarterly payment in case of failure to light from causes beyond the gas company's control ; nor do they say whether the company are to suffer a reduction of payment as well as damages in the case of failure to light from causes within their control.

At first sight it is very tempting to say " This is a contract to provide illumination, and the person who does not provide illumination cannot ask to be paid for it." But when the consequences come to be more closely looked into it is not so easy to follow them. The gas company supplies lighted gas for half the first quarter ; is then prevented by causes beyond its control from supplying lights till the middle of the second quarter, when the impediment is removed and the supply of light recommences. What is the consequence ? Can the council refuse payment for the first quarter and for the second quarter because a full quarter's gas is not supplied in either case ; but does the contract remain in existence, the company being bound to go on as soon as the impediment is removed ? Or is there to be an apportionment of the quarter's payments according to the time during which lighted gas is supplied,

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the time of darkness being written out of the contract? Does the contract come to an end when the supply of lighted gas has ceased for so long a time as to go to the root of the contract, to adopt the language of Blackburn J. in *Bettini* v. *Gye* (1), citing with approval Parke B. in *Graves* v. *Legg* (2), or to defeat the commercial purpose of the adventure, in the language of Bramwell B. in *Jackson* v. *Union Marine Insurance Co.* (3)? The attempt to answer these questions suggests that the Court may really be being asked to make an agreement for the parties in a matter which they have not thought of or expressly dealt with. Since the time of *Paradine* v. *Jane* (4)—see also per Willes J. in *Lord Clifford* v. *Watts* (5), when the question was discussed whether a loyal Englishman need pay rent to his landlord when the house he rented had been destroyed by the King's enemies, the "wild Scots"—the distinction has been taken between duties or charges imposed by the law, where the party cannot perform it by events occurring without any default in him, in which case he is excused by the impossibility, and duties created by the agreement of the party, when he is "bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." Since then the Courts have steadily refused to make contracts for parties, which they might have, and have not, made for themselves, unless the term is so obvious and necessary that it must be implied as a matter of business in such a contract: *The Moorcock.* (6) It is said that the supply of lighted gas has become illegal. This is true for an uncertain time; at any moment the illegality may be removed by peace or changed conditions of war. But the payment of the quarterly sum has not become illegal, and part of it is not for light supplied, but for plant which has been supplied and of which the council has had the benefit. To excuse themselves from breaking the contract to pay, not being an illegal contract, the council must, I think, satisfy the Court of one of two things. Either they must establish that the performance of the contract to supply lighted gas is a condition precedent of the necessity to observe the contract

(1) 1 Q. B. D. 183, 188.
(2) 9 Ex. 709, 716.
(3) L. R. 10 C. P. 125.
(4) (1670) Aleyn, 26.
(5) (1870) L. R. 5 C. P. 577, 586.
(6) (1889) 14 P. D. 64, 68.

to make a quarterly payment, so that the two contracts are "dependent" and not "independent," to use the language of *Pordage* v. *Cole* (1), and of Lord Mansfield in *Kingston* v. *Preston*, cited in *Jones* v. *Barkley* (2); in which case the company, not having supplied lighted gas for the whole of three quarters respectively, cannot sue for payment; or the council must satisfy the Court that, though a mere failure to supply lighted gas for a short time will not relieve them from payment, there is in this case such an extensive and permanent failure to supply as "goes to the root of the matter, so that the performance of the rest of the contract by the plaintiffs is rendered a different thing in substance from what the defendant has stipulated for": Blackburn J. in *Bettini* v. *Gye*. (3) First, can it be said that any failure to supply lighted gas, beyond these trifling failures to which the maxim "De minimis" might apply, prevents the company from recovering payment in respect of the quarter in which the failure occurs? Counsel for the defendants, I think, argued that it was so; and though I think they argued that a subsequent acceptance by the council of lighted gas after the failure might waive the breach, they, as I understood them, contended that a fortnight's or a month's failure not waived in this way annulled the whole contract. I cannot take the view that such a failure by itself annuls the contract, or that the contract might be treated as twenty quarterly separate contracts, one of which might be cancelled or blotted out while the rest remained. The payment is a flat rate payment, not a payment by meter for gas supplied; and it includes something for plant supplied and still available. For certain kinds of failure to supply light the parties have provided a remedy in damages, and in other cases a deduction from the quarterly payment. They have not expressly provided for the case of a failure to supply light owing to causes beyond the company's control, and I do not think the Court ought to make such a contract for them, when the consideration for the payment claimed has not wholly failed.

There remains the question whether, though a mere failure to supply will not by itself be sufficient to relieve from payment, a failure of such a lengthy and permanent character as substantially

(1) 1 Wms. Saund., 7th ed., p. 549. (2) (1781) 2 Doug. 684, 689.
(3) 1 Q. B. D. 183, 188.

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to alter the mode of performance of the contract will have this effect and terminate the contract. I think this must be so, even if the contract is one for a fixed time. I put to the counsel concerned the case of an Act of Parliament being passed, after the agreement had been in operation for a quarter, prohibiting lighting the gas for four years, and asked whether the agreement would remain alive or would be in force for the last nine months only when the operation of the Act had ceased. I think the agreement would be annulled for the reason that a supply of gas for a year in two broken periods would be a totally different thing from the five years' supply which the council bargained for, and that the obligation to supply gas for three months, and again four years later for nine months, for four quarterly payments would be a totally different contract from that which the company entered into. If this principle is granted the question is then one of fact. Is the period from the first total failure to supply on January 26 to the issue of the writ on November 10, that is nine and a half months, sufficient to annul a contract which is to last for at least five years, perhaps more, and of which the council has already had the benefit for three and a half years ? These questions of degree are always difficult, but, treating it as a question of fact, I should hold that there had not at the issue of the writ been sufficient change of character in performance to destroy the contract. For these reasons I arrive at the same result as Low J. and think that the appeal should be dismissed with costs.

Solicitors for gas company : *Mackrell, Maton & Co.*

Solicitor for defendant council : *Frank Graham, for Harold A. Mullens, Leiston.*

H. L. F.

[COURT OF CRIMINAL APPEAL.]

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*June* 23.

## THE KING *v.* BRIGHT.

*Criminal Law—Sentence—Evidence—Motive—Aggravating Circumstances.*

When a prisoner pleads guilty the judge may before passing sentence, in order to form an opinion as to the degree of culpability, hear evidence as to the motive which induced the prisoner to commit the offence; but where the offence is, by statute, punishable by a more severe sentence if accompanied by circumstances of aggravation, such circumstances may be taken into account in passing sentence only if they have been charged in the indictment and been proved to the satisfaction of the jury or admitted by a plea of guilty.

APPEAL against sentence.

At the Yorkshire County Assizes the appellant pleaded guilty to an indictment which charged him in two counts with a contravention of regulation No. 18 of the Regulations made by Order in Council under the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8). (1) Particulars of the offence under the first count were that

(1) Defence of the Realm (Consolidation) Regulations, 1914, as amended by Orders in Council:—

"18. No person shall without lawful authority collect, record, publish or communicate, or attempt to elicit, any information with respect to . . . . the supply, description, . . . . or manufacture . . . . of war material . . . . ; and if any person contravenes the provisions of this regulation, or without lawful authority or excuse has in his possession any document containing any such information as aforesaid, he shall be guilty of an offence against these Regulations."

"56.—(1.) Except as otherwise provided by this regulation, a person alleged to be guilty of an offence against these Regulations may be tried either by court-martial, or by a civil court with a jury, or by a court of summary jurisdiction.

"56A. Any offence tried by a civil court with a jury shall be deemed to be a felony, and on conviction of the offender he shall be liable to such punishment as might have been inflicted under regulation 57 if the case had been tried by a general court-martial. Provided that a sentence of death shall not be imposed unless the jury find that the offence was committed with the intention of assisting the enemy. . . . .

"57. A person found guilty of an offence against these Regulations by a court-martial shall be liable to be sentenced to penal servitude for life or any less punishment, or if the court finds that the offence was committed

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the appellant "did in the month of November, 1915, and on divers days in the months of February and March, 1916, in the county of York without lawful authority collect or attempt to elicit information with respect to the manufacture of war material." Particulars of offence under the second count were that the appellant "did on March 27, 1916, in the county of York have in his possession without lawful authority or excuse certain documents containing information with respect to the description of war material."

The evidence for the prosecution showed that the appellant had obtained from a workman in the employment of Messrs. Vickers, Limited, manufacturers of munitions of war, certain information and documents with regard to the description and manufacture of war material, and that he had offered to pay 100*l.* to the workman. There was no evidence to show that the information thus obtained had been communicated by the appellant to any other person.

After the appellant had pleaded guilty, two witnesses were called and examined by the judge (Avory J.). They were soldiers who, while in the custody of the police, had had some conversation with the appellant at the police station. They said that the appellant had asked them why they did not turn against their superior officers; that the appellant said that he did his travelling by road at nights; and one of them said that the appellant at first stated that he was a Prussian, but that he afterwards withdrew that statement.

Avory J., before sentencing the appellant, addressed him as follows: "But for your plea of guilty the jury would have been charged to inquire whether the offence was committed by you with the intention of assisting the enemy, and, in my opinion, you would have been in serious danger of having that question of fact decided against you by the jury upon the evidence which would have been laid before them. It would have been difficult for the jury to draw any other inference from the facts of this case than that you were doing this as a traitor to your country with the intention of assisting the enemy. The facts show that you were actually offering the

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with the intention of assisting the enemy to suffer death or any less punishment, and the court may in addition to any other sentence imposed order that any goods in respect of which the offence has been committed be forfeited; . . . ."

sum of 100*l.* to an employee of this firm, who, you knew, were manufacturing war materials for His Majesty, in order to obtain the information that you desired. If a jury had found that fact against you, I should without the slightest hesitation have passed upon you the extreme sentence which the law authorizes, that is, the penalty of death. As it is I have to deal with your case, drawing my own inference as to the gravity of it. Your counsel has said all that could be said to minimize the effect of the evidence which the two soldiers have given to the Court of your conversation with them at the police station. To my mind that conversation throws a considerable light upon your motives and upon your attitude of mind in this matter. It is sufficient, at all events, to show that you are a disloyal subject, and it is so short a step from that to the inference that you were intending to assist the enemy that I cannot doubt that a jury, if they had had to inquire, would have found that fact against you. It is unnecessary for me to say a word about the gravity of this offence which you have committed. You stand confessed a traitor to your country, and I should not be doing my duty if I did not take such steps as I can to make it impossible that you shall have the opportunity of communicating to the enemy at any time the information which you have unlawfully obtained." The learned judge then sentenced the appellant to penal servitude for life.

*N. L. Macaskie*, for the appellant. The appellant was not charged with obtaining the information with the intention of assisting the enemy, but the learned judge in sentencing the appellant took into consideration the evidence of the two soldiers, which in his opinion showed that the appellant had committed the offence with that intention. The appellant has in fact been sentenced in respect of an offence for which he was not indicted, and to which he has not pleaded guilty. After a plea of guilty, or verdict, evidence is not admissible to prove circumstances of aggravation or mitigation, or the motive with which the offence was committed : *Rex* v. *Ellis* (1) ; *Reg.* v. *Hodgkinson*. (2) The judge having proceeded upon a wrong principle, the case is one in which this Court should exercise the power to reduce the sentence.

(1) (1826) 6 B. & C. 145. (2) (1900) 64 J. P. 808.

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*Tindal Atkinson, K.C.* (*G. F. L. Mortimer* with him), for the Crown. When a prisoner pleads guilty the judge is always entitled to consider the motive with which the offence was committed in determining what punishment should be inflicted. The offence to which the appellant pleaded guilty was that of contravening regulation 18. An intention to assist the enemy is no part of the offence, but by regulation 56A a sentence of death cannot be passed unless the jury have found that there was that intention. Where a sentence other than that of death is going to be imposed for a breach of these regulations the judge may, and should, take into consideration all the circumstances of the case, including the motive or intention with which the particular act was done.

The judgment of the COURT (Darling, Bray, and Horridge JJ.) was delivered by

DARLING J. In this case the appellant pleaded guilty to an indictment which charged him in two counts with a contravention of regulation 18 of the Defence of the Realm (Consolidation) Regulations, 1914, by attempting to elicit information with regard to the manufacture of war material. He was sentenced by Avory J. to penal servitude for life, and he has appealed against that sentence. Objection has been taken to the fact that after the prisoner had pleaded two witnesses were called and examined by the judge for the purpose of informing himself as to the appellant's degree of culpability so that he might decide what the sentence should be. The Court is clearly of opinion that the judge had the right to hear the witnesses for that purpose even though the appellant had pleaded guilty. The next objection taken is that before passing sentence the judge considered what had been the appellant's motive in committing the offence. A judge has a perfect right to consider whether the prisoner's motive is good or bad, so that he may decide whether to pass a severe or a lenient sentence, but if the case be such that the prisoner's motive in committing the offence is one of the questions which the jury have to decide the judge must not attribute to the prisoner a motive which has been negatived by the verdict of the jury, and he must not attribute to the prisoner that he is guilty of an offence with which he has not been charged—nor must he assume that the prisoner is guilty of some statutory

aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation.

We think that in the present case Avory J. might legally have given the sentence of penal servitude for life without being influenced by any such considerations as we have excluded, and had that been his course of reasoning there would have been an exercise of his discretion with which this Court would not interfere. But Avory J. has given the reasons which influenced him, and he has included in them an assumption of the fact that it was the intention of the prisoner in doing these acts to assist the enemy. It therefore becomes necessary for us to look at the whole case and to consider whether the sentence can be justified on other grounds. It is quite clear from the evidence that the prisoner was collecting information as to the manufacture of war material which would be very valuable to the enemy and might also be valuable to other persons. The offence to which the prisoner had pleaded guilty was a very grave offence and one which might have produced very serious consequences for this country. If an intention to assist the enemy had been charged and proved to the satisfaction of a jury, the prisoner would have been liable to a sentence of death, but even in the absence of proof of that intention the offence was, particularly in war time, one of a very grave character.

Having regard to all the circumstances we think that the sentence ought to be reduced to one of ten years' penal servitude.

*Sentence reduced.*

Solicitor for appellant : *Registrar of the Court of Criminal Appeal.*
Solicitor for the Crown : *Director of Public Prosecutions.*

F. O. R.

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*April* 17;
*June* 2.

## HUNT *v.* RICHARDSON.

*Adulteration—Sale to Prejudice of Purchaser—Quality of Article demanded—Milk—No Addition or Abstraction—Deficiency in Milk Fat—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 2—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 4—*Sale of Milk Regulations*, 1901, *reg.* 1.

By s. 6 of the Sale of Food and Drugs Act, 1875, no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser, under a penalty.

By s. 4 of the Sale of Food and Drugs Act, 1899, the Board of Agriculture were empowered to make regulations for determining what deficiency in any of the normal constituents of genuine milk should for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary was proved, that the milk was not genuine. By No. 1 of the Sale of Milk Regulations, 1901, made under this enactment, where a sample of milk contains less than 3 per cent. of milk fat it is to be presumed that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water.

A farmer contracted to sell new milk each morning to a purchaser who was a retail dealer. The milk was delivered in churns. Nothing was added to or abstracted from the milk. The herbage on which the cows producing the milk were fed was in a watery condition owing to heavy rain in previous months. As a consequence the milk produced was copious but inferior. To maintain the quantity of milk the cows were also fed on green maize. They were given in addition such an amount of cake each day as was usual under normal conditions. On analysis the milk in a churn delivered to the purchaser was found to contain less than 3 per cent. of milk fat. The farmer was summoned before a Court of summary jurisdiction under s. 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser milk which was not of the nature, substance, and quality of the article demanded by the purchaser. The justices found that milk taken from a healthy herd should show not less than 3 per cent. of milk fat, and that the deficiency was due to the manner in which the farmer fed his cows with the object of obtaining a very large supply of milk without regard to the quality thereof, and they convicted the farmer. On a case stated for the opinion of the King's Bench Division :—

*Held* by Darling, Lawrence, and Avory JJ. (Bray and Scrutton JJ.

dissenting), that the conviction should be quashed on the ground that there was no evidence of an offence under s. 6 of the Act.

*Held* by Bray and Scrutton JJ., that the case should be sent back to the justices;

By Bray J. that they might find whether the milk supplied was new morning milk of merchantable quality, that being presumably the quality demanded by the purchaser;

By Scrutton J. that they might find (1.) what quality, if any, was demanded by the purchaser, and (2.) whether the milk supplied was of that quality.

*Wolfenden* v. *McCulloch* (1905) 69 J. P. 228 and *Scott* v. *Jack*, 1912 S. C. (J.) 87, approved. *Smithies* v. *Bridge* [1902] 2 K. B. 13 commented on.

CASE stated by justices for the borough of Cambridge.

1. An information was preferred by Ernest Richardson, the respondent, under s. 6 of the Sale of Food and Drugs Act, 1875 (1),

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.*; provided" &c.

Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 4, sub-s. 1: "The Board of Agriculture may, after such inquiry as they deem necessary, make regulations for determining what deficiency in any of the normal constituents of genuine milk, cream, butter, or cheese, or what addition of extraneous matter or proporof water, in any sample of milk (including condensed milk), cream, butter, or cheese, shall for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary is proved, that the milk, cream, butter, or cheese is not genuine or is injurious to health, and an analyst shall have regard to such regulations in certifying the result of an analysis under those Acts . . . ."

Sale of Milk Regulations, 1901:

"1. Where a sample of milk (not being milk sold as skimmed, or separated, or condensed, milk) contains less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk-fat, or the addition thereto of water.

"2. Where a sample of milk (not being milk sold as skimmed, or separated, or condensed, milk) contains less than 8·5 per cent. of milk solids other than milk-fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk solids other than milk-fat, or the addition thereto of water . . . ."

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against John Hunt, the appellant, charging that he did unlawfully sell to the prejudice of David Cox, the purchaser, a certain article of food, to wit, milk, which was deficient in milk fat to the extent of 9 per cent. and was not of the nature, substance, and quality of the article demanded by the purchaser. The justices convicted the appellant.

5. Upon the hearing of the information the following facts were proved or admitted :—

The appellant was a farmer and cowkeeper occupying and residing on a farm at Coton, a village about three miles from the borough of Cambridge. He had kept cows on his farm for about twenty-five years, and it was his practice to sell all his milk to retail dealers. On September 9, 1915, the date of the alleged offence, he had a herd of forty-one good shorthorn cows ranging in age from about three to ten years, of which twenty-eight were then giving milk. The herd was under the charge of three men, all of whom were competent and experienced in the management and milking of cows. These men milked the cows, and no one else interfered with or in any way dealt with the milk while it was on his premises or at any time prior to the sale to the purchaser. The cows were milked twice daily, the first milking commencing at 5 A.M. and the second at 1 A.M. These were the usual hours in the district. The cows were milked into pails, the milk being poured from the pails into another pail from which it was strained direct into the various churns which were kept near the appellant's house, and, when the quantity of milk ordered by each customer had been poured into the churn intended for delivery to the customer, all the churns were put direct on to the appellant's cart, driven into Cambridge, and delivered in the several churns to the respective customers. Nothing was added to or abstracted from the milk by the appellant or his servants beyond such abstraction of impurities as would be effected by straining the milk before pouring it into the churns and such abstraction, if any, as might take place by pouring the milk from one vessel into another. The morning milking occupied about two hours and was done rather hurriedly. Beyond the mixing which was necessary to make up the quantity required in each churn there was no general mixing of all the morning milk. In consequence of the heavy rains in the previous July and August the growth of grass and green feeding stuffs on the

appellant's farm was on September 9, 1915, and had been for some weeks previously, extraordinary in quantity, but it was in what is technically known as a washy or watery condition, and in consequence the appellant's cows, while being fed on such growths, had been giving a much larger quantity of milk than usual. The cows were given 3 lbs. of cake each per day in three meals throughout this season of the year, which was the usual allowance under normal conditions, and no special steps were taken to counteract the effect on the quality of milk of the washy state of the herbage or to test by technical means the effect of the washy herbage on the milk; but on the other hand the appellant and his men were well aware of what was taking place, and in spite of this the cows were shortly before September 9 given green maize, which was even more washy, in order to keep up the quantity of milk. The quality of milk is affected by the quantity and also by the state of health of the animal, the method of milking, and the manner of feeding, and the hours that elapse between successive milkings. If cows are not thoroughly milked out or stripped on any occasion the quality of the milk at that particular milking is poorer. One of the appellant's customers was a Mr. Cox, a retail milk dealer in Cambridge, who had contracted with the appellant for the purchase of five and a half gallons of new milk each morning to be delivered at the premises of Messrs. Tyler in Mill Street, Cambridge. On the morning of September 9, 1915, one of the appellant's men took from the farm the five and a half gallons of milk for Mr. Cox in an eight-gallon churn and delivered it in the churn at the premises of Messrs. Tyler about 8 A.M. He was met there by the respondent, who was a duly appointed inspector under the Sale of Food and Drugs Acts for the borough of Cambridge. The respondent there and then informed the appellant's man that he intended to take a sample of the milk then in course of delivery in the manner and with the formalities prescribed by the Acts. The respondent stirred up the milk in the churn with a tin pint measure, took out a pint of milk in the tin measure, poured it into a jug which he had provided, and from the jug into three bottles which he sealed up. One of these bottles he gave to the appellant's man, another he delivered to the public analyst the same day, and the third he retained and produced at the hearing. In due course he received

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the certificate of the public analyst, which, omitting formal parts, was as follows :—

" I am of opinion that the said sample contained the parts as under :

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| Total solids .. .. .. .. .. | 11·70 % |
| Non-fatty solids .. .. .. .. | 8·97 % |
| Milk fat .. .. .. .. .. | 2·73 % |
| Ash .. .. .. .. .. .. | ·80 % |

" I am also of opinion that the same is deficient in milk fat to the extent of nine per cent. (9 %).

" No change had taken place in the constitution of the sample that would interfere with the analysis."

The respondent had taken samples of the appellant's milk before and found them genuine. Milk taken from a healthy herd and mixed should not show less than 3 per cent. of milk fat ; but in a competition in a neighbouring county held under conditions which were not mentioned to the justices, the result of which competition was set forth in the report of the Royal Agricultural Society made by the steward of dairying at the Nottingham Show, 1915, between ninety-eight herds of cows, a great difference in the percentage of milk fat between the morning and afternoon milking had been disclosed, and in the case of several herds the morning milking frequently fell below the 3 per cent. standard, and the morning milking was more likely to be deficient in milk fat than the afternoon milking.

Under the Sale of Milk Regulations, 1901, issued by the Board of Agriculture and Fisheries, where a sample of milk contains less than 3 per cent. of milk fat it shall be presumed for the purposes of the Sale of Food and Drugs Acts, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water.

6. On the part of the respondent it was contended that new milk deficient in milk fat to the extent of 9 per cent. was an article of food which was not of the nature, substance, and quality of the article demanded by the purchaser, and that the appellant had committed an offence under s. 6 of the Food and Drugs Act, 1875, and that, although the appellant had shown that the milk had not been improperly dealt with by him or his servants and was in fact supplied

as it came from the cows, he had not used proper care having regard to the abnormal conditions prevailing at the time in feeding the cows, but had endeavoured to get quantity without regard to quality, and that he had failed to show that such care was taken in milking as would ensure the cows being milked out on the morning in question, and that, while the milk from a single cow might give less than 3 per cent. of milk fat, it was most improbable that the milk from a herd, if properly mixed, would do so.

7. On the part of the appellant it was contended that the milk was genuine milk as it came from the cows; that the cows had been properly milked; that morning milk is poorer in quality than afternoon milk, and that the condition of this milk was due to the fact that it was morning milk and to the quite exceptional condition of the herbage in the latter part of August and the beginning of September, 1915; that even if the appellant had fed the cows in a particular way with the object of obtaining a large quantity of milk, this was no offence provided he showed that the milk was supplied as it came from the cow, and that it was not of such a poor quality as not to be milk at all, and that a mere deficiency of 9 per cent. of milk fat did not warrant the justices in finding that this particular milk was not in fact milk, and that the appellant was entitled to have the information dismissed.

8. The attention of the justices was directed to the following decisions and regulations:—*Smithies* v. *Bridge* (1), *Wolfenden* v. *McCulloch* (2), *Scott* v. *Jack* (3), and the Sale of Milk Regulations, 1901.

9. The justices, being of opinion (*a*) that the milk in question was deficient in milk fat to the extent of 9 per cent., but that there had been no abstraction of milk fat or addition of water after it had come from the cows; (*b*) that the deficiency in milk fat was due to the manner in which the appellant had fed his cows with the object of obtaining a very large supply of milk without regard to the quality thereof, decided that the milk in question was not of the nature, substance, and quality of the article demanded by the purchaser, and convicted the appellant and imposed a fine of 2*l.* together with 3*l.* 3*s.* costs.

(1) [1902] 2 K. B. 13. (2) 69 J. P. 228.
(3) 1912 S. C. (J.) 87.

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The question upon which the decision of the Court was desired was whether the justices came to a correct decision in point of law, and if not, what should be done in the premises.

The case came on for hearing on April 4, 1916, before Ridley, Bray, and Avory JJ., but, on account of the importance of the point involved, was adjourned that it might be heard before a Court consisting of five judges. This hearing now took place.

*Disturnal, K.C.*, and *Hanbury Aggs*, for the appellant.
*Ricardo*, for the respondent.

June 2. The following written judgments were delivered :—

AVORY J. The offence alleged in this case was the sale of milk to the prejudice of David Cox, the purchaser, which was not of the nature, substance, and quality of the article demanded by the purchaser, contrary to s. 6 of the Sale of Food and Drugs Act, 1875. The article demanded was, as appears by the contract with the appellant, "new morning milk." The article supplied contained, according to the certificate of the public analyst, 2·73 per cent. of milk fat, and was in his opinion deficient in milk fat to the extent of 9 per cent. The justices found that it was deficient in milk fat to the extent of 9 per cent., but that there had been no abstraction of milk fat or any addition of water after it had come from the cow, and that the deficiency in the milk fat was due to the manner in which the appellant had fed his cows. They do not find that the article supplied was not milk, nor do they find that it was not new morning milk. If it was milk at all, it was clearly new morning milk. They must be taken, I think, to have accepted the evidence that the morning milk from a healthy herd of cows frequently contained less than 3 per cent. of milk fat, and the only ground suggested in the special case for the finding that there was a deficiency and that the sale was to the prejudice of the purchaser is the regulation made by the Board of Agriculture under s. 4 of the Sale of Food and Drugs Act, 1899, set out in paragraph 5 of the case.

This section does not authorize the Board of Agriculture to define what is milk, or to fix a standard of the normal constituents below which an article shall be deemed not to be milk, and the regulation providing that where a sample of milk contains less than

3 per cent. of milk fat it shall be presumed, until the contrary is proved, not to be genuine of necessity implies that it may be proved to be genuine although it contains less than 3 per cent. of milk fat. It is to be observed that s. 1 of the same Act of 1899, which deals with the importation of adulterated or impoverished milk, provides in sub-s. 7 that for the purposes of that section milk shall be deemed to be adulterated or impoverished if it has been mixed with any other substance, or if any part of it has been abstracted so as in either case to affect injuriously its quality, substance, or nature. This, I think, confirms the view implied in the regulation that milk which has not been so treated although it be deficient in milk fat is none the less deemed to be milk for the purposes of s. 6 of the Sale of Food and Drugs Act, 1875.

In my opinion the milk supplied in this case was proved to be genuine milk, and there was no evidence upon which the justices could find it was not of the nature, substance, and quality of the article demanded. Milk may vary in quality according to the breed of the cow, the nature of the feed, and the season of the year, and a purchaser may demand a particular quality ; but in this case there was no demand by the purchaser of any particular quality, but only of " new morning milk," which was in fact supplied ; and if, as Bray J. decides, there is on every purchase of new milk an implied demand that it shall be of merchantable quality, which I take to mean saleable in the market as new milk,—*Jones* v. *Just* (1)—there was not, in my opinion, in this case any evidence that the milk in question was not of merchantable quality, and there is no ground for suggesting that it was not fit for human consumption.

As to the previous decisions of this Court cited in argument, I think *Wolfenden* v. *McCulloch* (2) governs the present case, and I doubt if *Smithies* v. *Bridge* (3) is consistent with it. If it is, it can only be supported, I think, on the ground that there was evidence in that case upon which the justices could find that the article was not milk at all, which is the ground of the decision of Lord Alverstone C.J, as I understand it.

I agree with the decision of the Scottish judges in *Scott* v. *Jack* (4) and adopt the passage in the judgment of Lord Salvesen where he

(1) (1868) L. R. 3 Q. B. 197.
(2) 69 J. P. 228.
(3) [1902] 2 K. B. 13.
(4) 1912 S. C. (J.) 87.

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says (1): "If the purchaser had demanded sweet milk containing 3 per cent. of milk fat or upwards and had got milk of a poorer quality, an offence might have been committed; but the only demand here made was for sweet milk, and sweet milk unadulterated and not in any way tampered with was what was supplied." *Anness* v. *Grivell* (2) is also an authority for the same proposition, that if the purchaser gets what he asks for there is no sale to his prejudice.

I do not decide that anything drawn from the udder of a cow is necessarily milk, but, in the absence of any statutory enactment that an article shall not be deemed to be milk unless it conforms to a certain standard, I do not think the farmer who contracts to supply new milk is bound to feed his cows artificially or prevent them drinking too much water in order to maintain or produce milk of a particular quality. With all respect to the judgments of Bray J. and Scrutton J., an obligation on the farmer, who contracts merely to supply new milk to customers in different parts of the country, to supply milk of a particular quality which is to be determined to be merchantable or otherwise according to the varying views of magistrates in different parts of the country where it may be delivered, the farmer having no means of knowing beforehand in which district proceedings may be taken or to what standard the milk must conform, would, in my opinion, render the provisions of the Act of 1899 and the regulations made thereunder quite illusory and the enforcement of the penal statute under such conditions unjust and impracticable.

I think the appeal should be allowed and the conviction quashed.

SCRUTTON J. read the following judgment:—This special case, which, in view of differences of opinion between the English and Scotch Courts and amongst English judges themselves, is brought before a Court of five judges, raises questions of some difficulty as to the sale of milk.

Ernest Richardson was summoned before magistrates for selling milk not of the nature, substance, and quality demanded by the purchaser, one Cox. The magistrates have found that the milk was not of the nature, substance, and quality so demanded, and

(1) 1912 S. C. (J.) 100. (2) [1915] 3 K. B. 685.

have convicted him. They have, however, found that he did not abstract anything from or add anything to the milk after it left the cow. They apparently rest the conviction on a statement of the analyst that the milk is deficient in milk fat to the extent of 9 per cent., a figure which is arrived at by comparing 2·73 per cent., the actual percentage of milk fat in the milk in question, with 3 per cent., a figure contained in certain regulations of the Board of Agriculture, as to which the case finds that "milk taken from a healthy herd and mixed should show not less than 3 per cent. of milk fat," and they also seem to have been influenced by a finding that the deficiency in milk fat was due to the manner in which the appellant had fed his cows with the object of obtaining a very large supply of milk without regard to the quality of such milk.

Shortly and barely stated, the contention of the appellant appeared to be that where the vendor admittedly had neither added to nor abstracted from a natural product he could not be convicted of an offence against s. 6 of the Act of 1875, which really only dealt with adulteration. The contention of the respondent was that the offence under s. 6 was selling an article not of the nature, substance, and quality demanded; that adulteration was only relevant as one of the ways of proving this offence; that whether the article was or was not of the nature, substance, and quality demanded was a question of fact for the magistrates; and that there was evidence in this case on which they could find as they had done.

The Sale of Food and Drugs Act, 1875, repealed all previous Acts, but did not confine itself to codifying or consolidating them; it amended them. The special occasion of its enactment, as stated by Grantham J. in *Pain* v. *Boughtwood* (1), was the necessity of making clear when knowledge was or was not an ingredient in the offence. But opportunity was taken widely to vary the language of the amended Acts. I do not find that the expression "nature, substance, and quality" occurs in any earlier Act. The nearest words to it in the previous statute, 35 & 36 Vict. c. 74, s. 2, are "every person who shall sell as unadulterated any article of food or drink . . . . which is adulterated," and these words are pointedly omitted in the Act of 1875. That Act has three classes of offences: (i.) mixing in articles of food or drugs ingredients which make them

(1) (1890) 24 Q. B. D. 353, 355.

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injurious to health, and selling such articles so mixed : ss. 3, 4, and 5 ; (ii.) abstracting from articles of food any part so as injuriously to affect its quality, substance, or nature, or selling such articles so treated : s. 9 ; (iii.) selling any article of food or drug which is not of the nature, substance, and quality demanded by the purchaser, with certain exceptions : s. 6. This offence, by s. 2 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), is committed if the article is defective in nature, substance, or quality. The true construction of s. 6 is of considerable public importance, as under it the great majority of prosecutions under the Act are instituted.

It will be seen that, while adding or abstracting so as to cause injury to health are specifically dealt with in ss. 3 and 9, nothing is said in the definition of the offence in s. 6 about addition or abstraction, though certain additions are excused in the exceptions to that section. It seems, therefore, to be clear that if the article sold is not of the nature or substance or quality demanded it is immaterial that the vendor has not adulterated or tampered with it. For that reason the English Court in *Knight* v. *Bowers* (1) in 1885 convicted a man of supplying unadulterated savin when saffron was asked for, it not being of the nature and substance demanded. Mathew J. said that the preamble to the Act of 1875 did not show that every subsequent section was to be limited to adulteration and adulteration only, and A. L. Smith J., doubting whether the Legislature meant to include the case of a man selling an article pure and unadulterated but other than the article demanded by the purchaser, held that they had included that case. This decision is clear authority, unless it is overruled, for the proposition that it is an offence under s. 6 to supply an article not of the nature demanded, though the article is a natural product with nothing taken away or added by the vendor. Indeed this is only what the statute says in plain words. On the other hand, where the substance sold, though not technically that demanded, is generally known to the trade and public by the description demanded, no offence is committed. Thus in *Sandys* v. *Rhodes* (2) a sort of tapioca known to the trade and the public as sago and supplied as sago, and in *Anderson* v. *Britcher* (3) cane sugar from Mauritius supplied in answer to a

(1) (1885) 14 Q. B. D. 845. (2) (1903) 67 J. P. 352.
(3) (1913) 78 J. P. 65.

demand for Demerara sugar and found to possess the qualities now connoted in the trade and to the public by the term Demerara sugar, were held of the nature, substance, and quality demanded. I should take it to be an offence to supply under a demand for milk or cows' milk asses' or goats' milk, and I notice that Darling J. in *Smithies* v. *Bridge* (1) said: "I understand by the word 'milk' cow's milk, and I do not think that a person asking for milk would expect to get asses' milk, or that of any other animals." I gather that the learned judge would have convicted a vendor of milk who supplied asses' milk of supplying goods not of the nature demanded, though he had added nothing to and subtracted nothing from the natural product. The same view would apply to a man supplying chicory in answer to a demand for coffee, plaice in answer to a demand for soles, margarine with no butter in it in answer to a demand for butter. He has not supplied goods of the nature demanded, whether he has adulterated the goods or not. It is not necessary to consider here what meaning "substance" has as distinct from "nature." Perhaps Reginald Picard, of Stamford, who was convicted at the fair of St. Ives in 1275 of selling a ring of brass for 5½*d.*, "saying that the ring was of the purest gold and that he and a one-eyed man found it on the last Sunday in the church of St. Ives near the cross" (2), could be convicted at the present day, amongst other offences, of selling an article not of the "substance" demanded.

There remains the word "quality." Again it appears that a vendor commits an offence who sells an article not of the quality demanded whether he has or has not added anything to or taken anything from the article he sells. Where natural products are sold as "firsts" or "seconds" according to quality it would be, in my view, an offence to sell seconds when asked for firsts though nothing had been done to the seconds by the vendor. This would apply to different qualities of coal or of eggs. A man who when asked for new laid eggs supplied cooking eggs, as these terms are understood in the market, could be convicted of supplying goods not of the quality demanded, though he had not adulterated the eggs by addition or abstraction. On the meaning of the word

(1) [1902] 2 K. B. 13, 18.

(2) Select Pleas in Manorial Courts, ed. Maitland, Selden Soc. 1889, p. 139.

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"quality" we have the guidance of the Court in *Anness* v. *Grivell.* (1) Lord Reading C.J. said: "Quality means commercial quality, and not the commercial description of the article." Darling J. said: "I quite agree that the word 'quality' in s. 6 of the Sale of Food and Drugs Act, 1875, means the commercial quality, and is not equivalent to such a word as 'kind.' I do not think we can limit it to the sort of use that Mr. Barrington-Ward suggested, on behalf of the appellant, in the illustration that a purchaser would ask for Scotch or Irish, Lowland or Highland whisky. I think it means quality in the sense which my Lord has indicated." Lush J. agreed, and contrasted the most expensive and best quality with the cheapest and inferior quality.

If this is so, the question for the magistrates in this case would be, Was the article supplied of the nature, substance, and commercial quality demanded by the purchaser? This would be a question of fact for the magistrates. This and the question they have to consider have been laid down in numerous cases. In *Pashler* v. *Stevenitt* (2) gin was supplied containing 70 per cent. of water, 44 per cent. under proof. There was evidence that gin was sold of a strength down to 20 per cent. below proof. A witness said he would describe the article supplied as "gin whose alcoholic strength is exceedingly low." The magistrates convicted, and the High Court said: "The justices have come to the conclusion that a mixture of alcohol and water, so far as 44 per cent. below proof, is not of the quality of gin as known commercially. . . . . It is impossible for us to say they were wrong." This case was followed in *Webb* v. *Knight.* (3) The purchaser asked for gin and, being told there was gin at 2*s.* a pint and gin at 1*s.* 4*d.* a pint, selected the latter. A spirit 43 per cent. below proof was supplied. The magistrate convicted, and the High Court upheld his decision. Mellor J. said: "I agree with the observations of the judges in *Pashler* v. *Stevenitt* (2), that the question whether the article is that demanded by the purchaser is one of fact for the justices." "The appellant was at liberty, if it were possible for him to do so, to prove that gin like his own was commonly sold in the neighbourhood." Lush J. said: "I think it must always be a question for the magistrates

(1) [1915] 3 K. B. 685, 691, 693.
(2) (1876) 35 L. T. 862, 864.
(3) (1877) 2 Q. B. D. 530, 534, 535.

whether the amount of dilution is in excess of what is reasonable, or in other words, it was for them to say what quantity of water a purchaser may reasonably expect to find mixed with gin." Parliament then by s. 6 of the Sale of Food and Drugs Act, 1879, helped the magistrates by providing that it should be a good defence to prove that the admixture of water had not reduced the spirit more than 35 degrees under proof for gin.

But in cases where Parliament has not provided a statutory standard for the magistrates the prosecution must provide evidence to show that the article supplied is not of the nature, substance, and quality demanded. Thus in *Roberts* v. *Leeming* (1), dealing with margarine, the Court, while differing on the facts, agreed on the law that " The justices had to make their own standard according to the evidence before them, and they had to say, Was this article in accordance with the standard, or was it not ? " In *White* v. *Bywater* (2) the demand was for tincture of opium, which, as A. L. Smith J. said, " must mean the article known in commerce as tincture of opium " ; and, as the article supplied, though a tincture of opium, was of very inferior substance and quality to tincture of opium of commerce, the conviction was upheld. In *Goulder* v. *Rook* (3) the judgment of the Court concludes : " I must not be understood to suggest that every accidental introduction of deleterious matter into an article sold for food of necessity makes it different in nature, substance, and quality from the article demanded. It is for the magistrates in each case to find whether in fact the article supplied is of the nature, substance, and quality of the article demanded."

At this stage, applying the above remarks to the construction of s. 6 in regard to milk, it would seem that the magistrates have to find as a fact on evidence whether the article supplied is of the nature, substance, and quality demanded. They must ascertain the terms of the demand, interpreting those terms by evidence as to their commercial meaning where necessary, and by the implied warranties following from s. 14 of the Sale of Goods Act, 1893, reasonable fitness for consumption as human food under sub-s. 1, and merchantable quality if the goods are brought by description under

(1) (1905) 69 J. P. 417, 419. (2) (1887) 19 Q. B. D. 582, 585.
(3) [1901] 2 K. B. 290, 298.

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sub-s. 2. They must then find as a fact whether the article supplied complies with the demand so interpreted.

Before seeing how far this statement of the law is consistent with the cases on the sale of milk it is necessary to deal with the Act of 1899 and the regulations made thereunder. Sect. 4 of that Act empowers the Board of Agriculture to make regulations for determining what deficiency in any of the normal constituents of genuine milk, or what proportion of water in milk, shall raise a presumption, until the contrary is proved, that the milk is not genuine or is injurious to health. Regulations 1 and 2 of 1901 made under this section provide that less than 3 per cent. of milk fat, or 8·5 per cent. of milk solids other than fat, raises a presumption that the milk is not genuine by reason of abstraction of milk fat or milk solids other than milk fat, or the addition thereto of water. It will be observed (i.) that these regulations are not directed to injury to health as mentioned in s. 4 of the Act of 1899 or ss. 1, 2, and 9 of the Act of 1875: (ii.) that there is no enactment in terms making it an offence to sell milk which is not genuine, so that "genuine" must be used as equivalent to "of the nature, substance, and quality demanded." The only place where the word "genuine" is used is the preamble of the Act of 1875, where the words "pure and genuine" are used together, presumably having different meanings: (iii.) that the only effect of regulation 1 is, in the case of milk containing a smaller percentage of milk fat than the regulation prescribes, to throw the burden of proof that nothing has been abstracted or added on the vendor: (iv.) that if the vendor proves that nothing has been abstracted or added, the prosecution under s. 6 must then prove that the article is not of the nature, substance, or quality demanded in some other way, or fail. They may, for instance, prove that the article sold as cows' milk is really goats' milk: (v.) that, if the vendor does not prove that nothing is abstracted or added, there is a presumption that the milk is not genuine in the sense explained, i.e., not of the nature, substance, and quality demanded, and the vendor can be convicted: (vi.) but the Act of 1899 and the regulations create no new offence; they only deal with the burden of proof; the offence is still that of the Act of 1875, selling an article not of the nature, substance, and quality demanded.

I now proceed to consider the special cases decided by the English and Scotch Courts as to milk. In *Davidson* v. *M'Leod* (1) in 1877 the majority of the High Court of Justiciary, five judges against two, held, in a case of the sale of cream:—(i.) in the case of two of the majority that the article supplied must be deficient in nature, substance, and quality, all three, and in the case of all the majority that the official purchaser could not be prejudiced, so that there was no offence under s. 6 in the case of an official purchaser. The two judges who took view (i.) also held that you could not convict under s. 6 unless there was adulteration. The two judges who dissented held that the sheriff had found deficiency of quality as a fact and they could not interfere. The view of the majority, which made the Act a dead letter, was dissented from by the English Court in *Hoyle* v. *Hitchman* (2) in 1879, and the Legislature by the Act of 1879 gave statutory authority to the view of the English Court. But in *Hoyle* v. *Hitchman* (2) Lush J. pointed out that the actual decision in *Davidson* v. *M'Leod* (1) might be supported because, while the unadulterated cream was of an inferior quality to that ordinarily sold in Glasgow, "Cream is not an article having any standard of quality. . . . . This was genuine cream, though of inferior quality. It appears to me that the sale in such a case was not an offence within the Act at all." It is possible that the word "genuine" in the Act of 1899 came from this judgment. Whether there is a standard of quality for cream implied in asking for cream is in my view a question of fact and evidence, not of law. If there was a commercial standard of cream, or merchantable cream, I think an offence would be committed in supplying cream below that standard, though no adulteration took place. If no evidence is given of any standard of quality the prosecution would apparently fail, unless on similar lines to *Reg.* v. *Field* (3) and *Shortt* v. *Robinson* (4) as limited by *Preston* v. *Redfern* (5) the magistrates were allowed for some reason to act either on their own knowledge or on documents not admissible as evidence. I note that Lush J. expressly declined to decide whether the Scotch judges were right in holding that s. 6 applies only to an admixture of foreign ingredients. He says also:

(1) (1877) 5 R. (J.) 1.
(2) (1879) 4 Q. B. D. 233, 239, 241.
(3) (1895) 64 L. J. (M.C.) 158.
(4) (1899) 68 L. J. (Q.B.) 352.
(5) (1912) 76 J. P. 359.

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"I do not decide whether if a person sold Indian rice when he was asked for Carolina rice, such a case as that would be within the section." I think it is admitted now that it would be. In *Lane* v. *Collins* (1), in 1884, a seller was asked for milk and supplied skimmed milk 60 per cent. deficient in butter fat. The magistrate dismissed the summons. Mathew and Day JJ. affirmed his decision on the ground that it was not shown that what was supplied was not what according to the ordinary use of the term a purchaser might reasonably have expected to get from the vendor under the designation of "milk." If this decision proceeds on the ground that the analyst's certificate was not sufficient evidence of a commercial standard of quality, I understand it though I cannot agree with it. If on any other ground, I do not understand it and respectfully dissent from it. But the Act of 1899 and the regulations of 1901 appear to deprive it of any effect, as under that statute in a sale of skimmed milk the vendor will not be able to prove that he has not abstracted milk fat and so may have difficulty in overcoming the statutory presumption. In 1900 in *Banks* v. *Wooler* (2) the analyst's certificate found 10 per cent. of water added, and the magistrates found the milk exceptionally good and held that it was inexpedient to inflict any punishment. The Court (Channell and Bucknill JJ.) remitted the case with the intimation that if the milk was exceptionally good after adulteration the magistrates might consider the offence too trifling to convict; but if the milk was only exceptionally good before adulteration the offence was not trifling and the magistrates should convict. I should have thought the question was whether the milk was of the nature, substance, and quality demanded; that milk and water might not be a substance of the nature demanded; or it might be that the resultant fluid was not of the quality demanded, and that the magistrates should have been asked to decide this question. This view agrees with that of the Court in *Goulder* v. *Rook* (3) already cited. In *Smithies* v. *Bridge* (4) new milk was asked for; milk with only 2·09 per cent. of fat was supplied, the analysis stating the milk was deficient in the fat proper to genuine milk. The magistrates found that there had been no adulteration of or abstraction from the milk, but there was a long

(1) (1884) 14 Q. B. D. 193.
(2) (1900) 64 J. P. 245.
(3) [1901] 2 K. B. 290.
(4) [1902] 2 K. B. 13, 17, 18.

interval between the milkings, which increased the quantity of milk and decreased the percentage of fat in it. They found as a fact that the article supplied was not of the nature, substance, and quality of new milk without, as I understand, specifically finding in which respect it was defective. Lord Alverstone C.J. and Channell J. took the view that the magistrates had to find as a fact whether the article was of the nature, substance, and quality of milk, and that the deficiency of fat, with the reason why it was deficient, was evidence on which the magistrates might come to their finding. Channell J. was, I think, inclined to say the article was not of the nature of milk. "The cow was not in fact producing milk, but was producing another liquid which did not contain the constituent parts of milk." I should have preferred, if I had to find the fact, to say that the milk was not of the quality demanded, being milk so poor as to fall below the commercial standard, and I do not think that the previous treatment of the cow is material except that it explains why the milk falls below the commercial standard either as to nature or quality. While I think the question for the magistrates is correctly stated, I think there might have been a clearer direction to them of what they should consider. I state my view of that direction hereafter. Darling J. in dissenting said: "I do not think that I should have taken the trouble to differ in this case if I thought that our decision would only apply to milk because of the departmental order to which I have referred." I do not understand this passage in view of the importance which the learned judge attaches to the departmental order as freeing the appellant in the present case. The earlier part of his judgment seems to treat the order as setting up a fixed standard of milk instead of, as I think, a burden of proof. The learned judge continues: "I cannot help foreseeing the difficulties that might arise in such cases where no standard is in existence if it were to be held that a natural product was not of the nature, substance, and quality of the article demanded, because it did not contain all the elements, and in the same proportions in which those elements were usually present in normal examples of the natural product." I agree, if no evidence of commercial quality, merchantableness, or fitness for purpose can be given, there can be no conviction in respect of quality. I confine my dissent to cases where such evidence is available. The learned judge further says:

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"In the case of other things than milk, I think it would be highly dangerous for us to lay down that a man may be convicted under s. 6 of the Sale of Food and Drugs Act, 1875, for selling a natural product in the state in which he gets it. For example, a purchaser who had demanded apples, and had received them as they were plucked from the tree, might complain that they contained less malic acid or other essential than some analyst might prove to be usual in apples. Poor in quality they might be –but they would still be apples and as Nature produced them." But I understand the earlier part of the judgment to agree that the supplier of a natural product, asses' milk, in the state in which he gets it, in response to a demand for milk, or cows' milk, could be convicted—I suppose for supplying an article not of the nature demanded; and I think a man who, asked for apples, supplied rotten apples could be convicted of supplying apples not of the quality demanded. I respectfully dissent from this judgment, though I should word the majority judgment somewhat differently. In *Wolfenden* v. *McCulloch* (1) milk was asked for; the analyst reported 2·81 per cent. of fat; the magistrates found milking at unusual hours and no adulteration or abstraction, but held they were bound by the decision in *Smithies* v. *Bridge* (2) to convict. They did not specifically find anything about the nature, substance, or quality of the article supplied. Lord Alverstone C.J. said that the justices ought to have considered for themselves whether the milk was of the nature, substance, and quality demanded, and that there was no evidence to connect the small deficiency in milk fat with anything abnormal, the milking hours being usual. Lord Alverstone C.J. adhered to what he had said in *Smithies* v. *Bridge* (2), and neither of the other judges dissented. In 1912 a milk case came before the Scotch Courts in *Scott* v. *Jack*. (3) The article demanded was sweet milk; the analysis showed only 2·57 per cent. of milk fat; the milk was found to be not tampered with or adulterated, but the vendor fed the cows so as to produce the largest yield of milk and paid no attention to the quality. The sheriff found the deficiency in milk fat was due to a method of feeding intentionally adopted. He did not find whether the milk was of the nature, substance, and

(1) 69 J. P. 228. (2) [1902] 2 K. B. 13.
(3) 1912 S. C. (J.) 87.

quality demanded, but dismissed the complaint. For some reason the vendor was charged with an offence against the Milk Regulations, which, as I understand them, create no offence, as well as against the statute. I think the Scotch judges accept the view of Darling J. in *Smithies* v. *Bridge*. (1) They seem to treat the regulation of 1901 as providing the only way in which an offence under s. 6 can be proved. They treat the question as one of law, dissenting from the English view laid down in numerous cases that it is a question of fact for the magistrate. Some of them held that there can be no offence if there is no adulteration or abstraction, though they do not state their view of such English cases as *Knight* v. *Bowers* (2), where there was no adulteration or abstraction, but a conviction. For the reasons I have stated I respectfully disagree with these positions. Lastly, in *Marshall* v. *Skett* (3), in December, 1912, milk was asked for. The analysis showed a deficiency of milk fat of 26 per cent. No other evidence was given except that another sample of that milking showed just 3 per cent. of milk fat, and a sample taken a month later a very slight deficiency. The magistrates found that the milk was not of the nature, substance, and quality demanded, but as they were satisfied that the milk was as it came from the cow they did not convict. The Court directed the magistrates to convict unless the respondent adduced further evidence. This is a decision that if the milk was not of the nature, substance, and quality demanded it is immaterial that it was as it came from the cow. With this I agree.

I agree also with my brother Darling in *Smithies* v. *Bridge* (1) that the principles laid down in this case cannot be limited to milk. For the Act of 1899 and the Regulations of 1901 do not, in my view, alter the offence in s. 6, but only give one way of proving that it has been committed, which one way of proof can be negatived or defeated in a specified way. The principles apply to all natural products. The first question is, Is the natural product supplied of the nature demanded? The only materiality of the question whether the article supplied has had substances added or subtracted is in helping to show whether the article supplied is of the nature demanded. Milk and water may not be milk. Gin and water may be gin.

(1) [1902] 2 K. B. 13. (2) 14 Q. B. D. 845.
(3) (1912) 77 J. P. 173.

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But the offence may be committed though no addition to or subtraction from the article supplied is made. Take for example savin supplied for saffron; pure asses' milk for cows' milk; neither is adulterated, but neither is of the nature demanded.

The same question arises when quality is demanded. What has happened to the milk, whether by intentional faulty feeding or by subsequent addition or abstraction, may explain why the article supplied is not of the quality demanded; but the real questions are What is the quality demanded? and Has it been supplied? If it has not, it is immaterial that there has been no adulteration or abstraction. New laid eggs are asked for; bad eggs are supplied; an offence against s. 6 has been committed. The quality demanded is a question of fact; it may be a question of the interpretation of a trade description; it may be a question of evidence of the commercial quality spoken of by the Court in *Anness* v. *Grivell* (1); it may be a question of evidence of merchantable quality implied by the Sale of Goods Act, 1893, in goods sold by description. But it is a question of fact for the magistrates, not of law for the Court, who are not judges of fact and may not know accurately what they think they know about it. A natural product may be so poor in quality, though the genuine product of Nature, that it does not possess the commercial or merchantable quality which is required by the custom of buyers and sellers, which is a question of evidence. It is, I think, common knowledge that some milk is so poor from the poor condition of the animal that it will not nourish; some meat so poor from the poor condition of the animal that no consumer except the poorest would have it on his table. In my view to supply such products will be an offence though the products have not been tampered with.

It remains to apply these principles to the facts of the present case. The magistrates find a herd of good cows milked at the usual hours in the district and nothing added to or abstracted from their milk. They find a deficiency of milk fat of 9 per cent. from the standard of the Board of Agriculture, 3 per cent., and that milk taken from a healthy herd and mixed should show not less than 3 per cent. of milk fat; and they find that the deficiency in milk fat was due to the manner in which the appellant had fed his cows with

(1) [1915] 3 K. B. 685.

the object of obtaining a very large supply of milk without regard to the quality of such milk. The demand was for "new milk each morning." On this evidence they determine that the milk was not of the nature, substance, and quality demanded. I cannot help suspecting that they have been influenced by the fact that the milk is below the standard of the Board of Agriculture, and that the appellant has fed his cattle so as to make it so, without addressing their minds to the question whether the milk supplied is of the commercial or merchantable quality required by the usages of buyers or sellers of milk. It may be of that quality though it is below the standard of the Board of Agriculture, or though the seller has fed his cows to get quantity; it may not be of that quality though it is not adulterated. It is a question of fact depending on evidence. If there is no evidence of such a standard of commercial or merchantable quality there can, in my view, be no conviction where the article is of the nature demanded. In my opinion the case should go back to the magistrates to answer the question of fact whether the milk supplied was of the nature, substance, and quality demanded in view of the principles laid down in this judgment.

A. T. LAWRENCE J. (1) In this case it is found as a fact that the milk in question was when sold the morning product in its natural condition of a herd of good cows. It had nothing abstracted from it and nothing added to it. It was genuine new milk. It was not suggested that it was injurious to health.

The only thing said against it was that according to the certificate of an analyst it did not contain quite 3 per cent. of butter fat. This was said to be due to the fact that the cows had fed upon herbage described as washy, and the washy herbage was said to be due to an unusually wet season. The statute 38 & 39 Vict. c. 63 does not enact any standard of quality in milk, nor does 62 & 63 Vict. c. 51 nor the regulations made thereunder. Every species of cow differs in the quality of its milk, and it is probable that every cow differs slightly from day to day in the quality of the milk it produces. The regulations of 1901, when they prescribed 3 per cent. of butter fats as a test of genuineness, seem to have foreseen the facts of this case

(1) Read by Avory J.

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and to have provided a defence which this appellant has established. He satisfied the justices that the deficiency in butter fats shown by the certificate was not due to any addition to or abstraction from the milk, but that he was selling as " new milk " that which was in fact milk as recently taken from a healthy cow.

The justices appear to have convicted the appellant because he knew that the condition of the herbage would cause the cows to give a very large supply of milk and continued to feed them on it without regard to its effect upon the quality of the milk. This does not constitute an offence. Sect. 6 is not aimed at the use of milk-producing foods, still less at the dairykeeper's not taking steps to counteract the natural effects of changes of climate.

I think this appeal should be allowed.

BRAY J. (1) This is a case stated by magistrates. The appellant was charged with having sold milk deficient in milk fat, and not of the nature, substance, and quality of the article demanded by the purchaser, contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875. He was convicted, and the question for the Court is whether, having regard to the findings of fact in the case, he was rightly convicted. Paragraph 9 of the case runs thus : [The learned judge read paragraph 9 of the case and proceeded :]

The main point raised by the appellant was this, that in the case of milk from a healthy cow, if it were proved or found as a fact that the milk sold was milk which had come from the cow without any abstraction or addition, no offence against s. 6 could have been committed. It was further contended that if the first point failed the appellant still ought not to have been convicted on the facts stated in the case.

The case came in the first instance before Ridley J., Avory J., and myself and, as we were asked by the appellant's counsel to overrule the decision of *Smithies* v. *Bridge* (2) and to adopt the decision of the Scotch Court in *Scott* v. *Jack* (3)—in other words, to decide that if the milk is genuine and unadulterated no offence can have been committed—it seemed to us that it ought to be referred to a full Court as being a point of general importance and of

(1) Read by Scrutton J. (2) [1902] 2 K. B. 13.
(3) 1912 S. C. (J.) 87.

considerable difficulty. Accordingly the case was argued before us on April 17, when we reserved our judgment.

In my opinion our decision on the main point must turn on the true construction of s. 6 of the Act of 1875. The important words of that section are "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds." The article ordered or demanded by the purchaser in this case was new milk each morning. Nothing turns upon the word "new," but something may turn upon the word "morning," as there was evidence that the morning milk is apt to be less rich in fat than the afternoon milk. No particular quality was demanded, and the first question that arises was what quality was the purchaser entitled to. This was a sale of goods by description and seems to me to clearly come within the provisions of s. 14, sub-s. 2, of the Sale of Goods Act, 1893, which is as follows: "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality." I may observe that this was not new law. The cases decided before the Act of 1893 established that this was part of the common law.

It is clear that the appellant was a seller who dealt in goods described as milk. If that be so, the quality demanded was merchantable quality. I think in his reply Mr. Disturnal admitted this, but I prefer to examine the contentions to the contrary put forward on the part of the appellant and the cases that have been decided on the point. First, it was said that, at all events as regards milk and any other natural product, there could be no offence if the article was pure and unadulterated. Reliance was placed on certain words in the preamble, "and that the law regarding the sale of food and drugs in a pure and genuine condition should be amended." But if the words in the Act itself are clear and unambiguous their meaning cannot be altered by the preamble. The word "quality" seems to be quite unambiguous. As regards drugs, this point was decided in *Knight* v. *Bowers*. (1) In giving judgment in that case A. L. Smith J., as he then was, said: "I cannot escape from the terms of

(1) 14 Q. B. D. 845, 848.

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s. 6; and, though I doubt whether the Legislature meant to include the case of a man selling an article pure and unadulterated, but other than the article demanded by the purchaser, I can only say that they have included that case." That case was decided in the year 1885. It has never been questioned since, and though the Act of 1875 has been amended more than once, the wording of s. 6 has not been altered. This decision was in reference to a drug, but the words "of the nature, substance, and quality" apply also to any article of food. Nor can it make any difference whether such article is a natural product or not. Take another natural product, such as fruit. Could it be said that unripe or overripe fruit was of the quality demanded? In quite a recent case—*Anness* v. *Grivell* (1)—it was held that quality in s. 6 meant the commercial quality of the article sold. "Quality," said Lord Reading C.J., "means commercial quality, and not the commercial description of the article." Darling J. said it was not equivalent to kind, and Lush J. said: "If it was of the nature and substance and yet was not of the quality demanded an offence has been committed."

I can come to no other conclusion than that under the Act of 1875 any article of food, whether a natural product such as milk or an artificial product such as bread, must be of the quality demanded, and that it is no answer to say that it is genuine and not adulterated.

Then has the law been altered as regards milk by the Act of 1899? Sect. 4 provided that the Board of Agriculture might make regulations for determining what deficiency in any of the normal constituents of genuine milk . . . . should for the purposes of the Sale of Food and Drugs Acts raise a presumption that the milk . . . . was not genuine or was injurious to health. The regulations made in 1901 provided that milk containing less than 3 per cent. of milk fat or less than 8·7 per cent. of non-fatty solids should be presumed not to be genuine. It is impossible to read this section or the Order made under it as altering in any way the provisions of s. 6 of the Act of 1875. It merely affected the mode of proof and provided that, if the ingredients of the milk did not reach the particular standard, it should be presumed, until the contrary was proved, that the milk was not genuine. I think that the word "genuine" means unadulterated and that s. 4 of the Act of 1899

(1) [1915] 3 K. B. 685, 691, 694.

gives some colour to the contention that if the milk is genuine no offence has been committed, but it cannot alter the plain meaning of the words in s. 6 of the Act of 1875. Nor, indeed, was it so contended before us. It remains, therefore, that the milk must be of the quality demanded, and, if no particular quality was demanded as here, that the milk must be of merchantable quality. What is the meaning of the word "merchantable" in relation to milk? Mr. Disturnal contended that if the milk were genuine it must be merchantable of however poor quality. On what ground is that contention put forward? He did not tell us. What is merchantable and what is not merchantable is a pure question of fact to be determined by the evidence of those who deal in the article, sellers and buyers. It is not a question of law at all. As soon as the quality gets lower than a certain point the article ceases to be merchantable. If the article be milk it ceases to be saleable as ordinary milk. I do not think that the standard of 3 per cent. set up by the Board of Agriculture implies that milk below that standard is not of merchantable quality, but the fact that that standard exists, and that any one selling milk below that standard runs the risk of prosecution, I have no doubt seriously affects the saleability of milk below that standard and, it may be, in the opinion of sellers and buyers who know the real quality renders it unsaleable. If a farmer advertised that he fed his cows so as to increase the quantity of milk at the expense of its quality, and that in consequence it might not reach the standard of the Board of Agriculture, who would buy it as milk to be retailed in the ordinary way? But however that may be, it cannot be said as a matter of law that, however poor the milk may be, it must be of merchantable quality if it be genuine.

If I am right in this conclusion, *Scott* v. *Jack* (1) is wrong; and in my opinion it is wrong. I think the learned judges in that case were possibly misled by the arguments of counsel who supported the conviction. Their contention was that if the milk fell below the standard set up by the Board of Agriculture an offence had been committed, however genuine the milk was. The information was based on this contention. The Court were quite right, in my opinion, in rejecting that contention. But they were wrong when they decided, as I think they did decide, that if the milk was

(1) 1912 S. C. (J.) 87.

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genuine, i.e., not adulterated, no offence could have been committed. I think the judgment of Channell J. in *Smithies* v. *Bridge* (1) was right. He held that if the article sold as milk was not milk (by which, I have no doubt, he meant not milk in the commercial sense) it was not of the nature, substance, and quality demanded. I think perhaps Lord Alverstone C.J. laid too much stress upon the abnormal treating of the cow. That, in my opinion, did not of itself make the milk non-merchantable milk, though it was evidence of it. I think the decision in *Smithies* v. *Bridge* (1) was right. The magistrates found as a fact that the milk was not of the nature, substance, and quality demanded, and there was evidence to support that finding.

The principle of law laid down in that case was followed in *Wolfenden* v. *McCulloch* (2), though, the facts and findings of the magistrates being different, the conviction was quashed. Lord Alverstone C.J. expressly adhered to what he had stated in *Smithies* v. *Bridge* (1), and neither of the other learned judges dissented from the judgment in that case. My answer to the main point is that *Smithies* v. *Bridge* (1) was rightly decided and *Jack* v. *Scott* (3) was wrongly decided. An offence may have been committed although the milk is genuine and unadulterated. I come, therefore, to the second point.

I have to consider the facts and findings in this case. The magistrates have found as a fact that the milk was not of the nature, substance, and quality demanded, but they have based their decision upon the finding (*b*) that the deficiency in milk fat was due to the manner in which the appellant fed his cows with the object of obtaining a very large supply of milk without regard to the quality of such milk. I do not think they have addressed themselves to the real point, namely, whether the milk was merchantable milk, and I think the case ought to go back to them to find this fact. As I have already said, this is a question of fact. It may well be that the fact that there was a deficiency of milk fat to the extent of 9 per cent. makes the milk unsaleable as ordinary milk in the trade, or that it makes it unsaleable if, in addition, it is known to the buyer that this deficiency has been caused by the deliberate abnormal

(1) [1902] 2 K. B. 13. (2) 69 J. P. 228.
(3) 1912 S. C. (J.) 87.

treatment of the cow. On the other hand, it may be that in the trade milk, however deficient in milk fat or milk solids however caused, is saleable as milk provided it is not adulterated, though I should be very much surprised if this were the fact. It must be remembered that for the purpose of deciding whether the milk is merchantable or not it must be assumed that the purchaser knows the facts, and, as I have said, it is extremely unlikely that a man knowing the facts would buy such milk to sell again for human consumption.

It was said that if the magistrates have to find whether such milk is merchantable they have a very difficult task, and one bench of magistrates may differ from another in their finding, but in respect to all goods sold without any special warranty the task is one which judges and juries have often to discharge and on which they may differ. So that is no answer. It may be a very good reason why the Legislature should ask the Board of Agriculture to fix a standard and enact that all milk below that standard should not be considered as of merchantable quality. Provided the standard was fairly fixed so as to exclude milk from abnormal cows or cows treated abnormally, as well as adulterated milk, it would be very greatly to the advantage both of the producer and the customer. There is no reason why the farmer who feeds his cows in such a way as to reduce the quality of the milk should not be prevented from selling such milk to customers who are ignorant of the facts. The customer suffers just as much as if the quality were reduced by the addition of water. The whole object of the Act is to protect the consumer. If *Scott* v. *Jack* (1) is good law, the consumer is not protected even if the farmer has deliberately reduced the quality of the milk. In point of morality I cannot distinguish between that case and the case where he adds water. It is said that there are cows which naturally give milk below the standard fixed by the Board of Agriculture. This may be so, but the sooner they are sent to the butcher the better. The keeping of such cows should not be encouraged. The customers ought not to suffer. I think the case should go back to the magistrates. They have found that the milk was genuine, but they have not expressly found whether it was of merchantable quality or not. They ought not to find in this case

(1) 1912 S. C. (J.) 87.

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that the milk was not of the nature, substance, and quality demanded unless they are satisfied that the milk was not of merchantable quality.

DARLING J. The facts stated in this case as having been found by the justices, together with the justices' decision upon them, raise the question whether it is an offence against the statute 38 & 39 Vict. c. 63 to sell as new milk the natural product of the morning milking of several cows, such liquid being not otherwise than wholesome and pure exactly as it was drawn from the cows.

In my opinion the statute in question as well as 62 & 63 Vict. c. 51 and the Regulations made thereunder by the Board of Agriculture were designed to prevent the sale of milk "not genuine" or "injurious to health" even if genuine. This is to be gathered from the words of 62 & 63 Vict. c. 51 and from the Sale of Milk Regulations, 1901, as well as from the preamble of 38 & 39 Vict. c. 63. I do not think that these statutes were intended to provide a standard regulating the proportions in which various matters must be present in a natural product to justify the sale of it by its market name. "Genuine" does not mean rich nor poor, nor thick nor thin. The very case which we are considering shows that the evening milk from these same cows would have better satisfied the analytical test than that drawn in the morning, and it might therefore be possible to convince a chemist and perhaps a Court of law that the evening draught was "genuine" milk if qualified by the prefix "morning."

So far as s. 6 of 38 & 39 Vict c. 63 is concerned with milk, I think that it makes it an offence to sell this not in its natural state, be it rich or poor, but with some alteration of its "nature, substance, or quality" due to the addition or subtraction of something. This view is strengthened by consideration of the various sub-sections of s. 6. I think it is also worth while to observe that although the statute 62 & 63 Vict. c. 51 deals with "impoverished" milk and other articles when imported and enacts a standard for some of these articles, it nowhere gives any indication as to what are the proper proportions in which the natural ingredients should be present in milk. That statute, as it seems to me, would have provided the very occasion for creating the offence now contended for, had the Legislature desired to decree it.

All the reasoning of the Lords of the Court of Session in deciding the case of *Scott* v. *Jack* (1) is equally applicable to this one. They expressly stated that in their view the case of *Smithies* v. *Bridge* (2) was wrongly decided. As to that my own opinion may be thought not free from prepossession, but I am confirmed in it by a passage in the judgment of Lord Alverstone C.J. delivered after my own, wherein he says: "As to the recent Order of the Board of Agriculture, I do not think it purports to set up a standard of what is or is not genuine milk, but only means to say that the want of a certain percentage of fat is to be prima facie evidence that the milk is not genuine, and it will still be open to the defendant to prove that the milk is genuine." But the regulation which Lord Alverstone quotes seems to me to lead to quite another conclusion if only it be read to the end, for the word "genuine" is in the regulation, amplified or explained by these words immediately following it, "by reason of the abstraction therefrom of milk fat or the addition thereto of water." Now what should it profit the defendant to disprove that presumption if he might yet be held guilty merely because he had milked his cow in the morning, or had allowed her to indulge too far her taste for aqueous herbage in pastures new?

I think that this appeal should be allowed.

*Appeal allowed.*

Solicitors for appellant: *Torr & Co., for Algernon Lyon, Cambridge.*
Solicitor for respondent: *J. E. L. Whitehead, Cambridge.*

(1) 1912 S. C. (J.) 87. (2) [1902] 2 K. B. 13, 20.

W. H. G.

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*Alien—Nationality—Son born Abroad of Naturalized British Father—Son residing during Infancy in United Kingdom with Widowed Mother—No grant of Certificate of Naturalization to Mother—Status of Son—Naturalization Act*, 1870 (33 *Vict. c.* 14), *s.* 10.

Sect. 10, sub-s. 1, of the Naturalization Act, 1870, provides that "A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject"; and sub-s. 5 provides that "Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject."

The appellant was born in Germany in 1875. His parents were both aliens by birth, but after their marriage, and before the birth of the appellant, the father became a naturalized British subject under the Aliens Act, 1844. The appellant continued to reside in Germany till the death of his father in 1887, but thereafter he came to England and he resided there during a portion of his infancy with his widowed mother, who, however, had not obtained a certificate of naturalization in the United Kingdom:—

*Held*, that, even assuming that the appellant's father, who was naturalized under the Aliens Act, 1844, became entitled to the privileges conferred by the Naturalization Act, 1870, the appellant did not obtain the status of British nationality under s. 10, sub-s. 5, of the latter Act, for, although his mother, by virtue of her husband's naturalization, became entitled to all the rights and privileges of a British subject, she had not obtained a certificate of naturalization in the United Kingdom.

Case stated by justices of the West Riding of Yorkshire.

The appellant was charged with having contravened s. 19, sub-s. 1, of Part II. of the Aliens Restriction (Consolidation) Order, 1914, by having on October 22, 1915, he being an alien enemy, failed to furnish certain particulars for registration required by the said Order.

The following facts were proved or admitted:—The appellant was the son of the late Rev. Philip Jaffé, who came to England from the province of Posen, East Prussia, in 1839 when fourteen years of age, he then being an alien Jew. On December 22, 1853, Philip Jaffé (having previously been converted to Christianity)

married a German woman at the Surrey Congregational Chapel; in 1854 he obtained a certificate of naturalization in this country, and duly took the oath required by the Aliens Act, 1844; and in 1856 he was sent as a Protestant Christian missionary by the British Society for the Propagation of the Gospel among the Jews to Frankfort, where he remained till 1858, when he was transferred by the society to Nuremberg, where he remained till his death in 1887. The appellant was one of the children of the said marriage, and he was born at Nuremberg on February 12, 1875. On the death of his father in 1887 the appellant, then twelve years of age, came to England to reside with an elder sister and her husband (who was a natural-born British subject), and he had resided in England ever since. In April, 1890, the appellant's mother communicated from Hamburg with the then Secretary of State for the Home Department, who replied to her in a letter dated April 30, 1890, as follows: ". . . . A certificate of naturalization was granted to Mr. Philip Jaffé on August 19, 1854. . . . . I am to add that unless your husband took any steps to divest himself of his British nationality so acquired, you, as his wife, became also a British subject in virtue of s. 10, sub-s. 1, of the Naturalization Act, 1870, and in the absence of any proceeding on your part to divest yourself of such quality you remain a British subject." The appellant's mother never, being a widow, obtained a certificate of naturalization in the United Kingdom under s. 10, sub-s. 5, of the Naturalization Act, 1870, but in May, 1890, she, then being a widow, having given up her home in Germany, came to live in this country with her elder married daughter at Bradford. There the appellant, then being fifteen years of age, resided with his mother till October, 1890, when she left England for the Continent of Europe, travelling there till 1893, when she returned to Bradford for an indefinite period, where the appellant, then being eighteen years of age, resided with her for nearly one year. The mother then left England to nurse a daughter at Davos Platz, returning to this country in August, 1906, where she continued to reside till her death in 1914. The appellant had not been registered as an alien enemy, and he failed to give the particulars required by the Aliens Restriction (Consolidation) Order, 1914.

For the appellant it was contended that he was not an alien

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enemy, but was a naturalized British subject by virtue of s. 10, sub-ss. 1 and 5, of the Naturalization Act, 1870.

For the respondent it was contended that the appellant was an alien enemy and had committed the offence charged against him.

The justices being of opinion that the appellant was an alien enemy convicted him of the offence charged; and the question for the opinion of the Court was whether they were right in so holding.

*Waugh, K.C.* (*J. J. Wright* with him), for the appellant. The appellant by reason of his residence in England as an infant with his widowed mother became a naturalized British subject by virtue of the provisions of sub-s. 5 of s. 10 of the Naturalization Act, 1870. It is true that the appellant does not come within the literal meaning of sub-s. 5 inasmuch as his mother did not herself obtain a certificate of naturalization. But sub-s. 5 must be read in conjunction with sub-s. 1 of s. 10, which provides that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject. The appellant's father obtained a certificate of naturalization, and therefore his mother became a British subject by virtue of s. 10, sub-s. 1. Sub-s. 5 does not say that the widow must obtain a certificate during widowhood, but that "being a widow" she has obtained a certificate. The result of the appellant's father having obtained a certificate was that the appellant's mother was placed in the same position as if she had herself obtained a certificate, and therefore for the purposes of sub-s. 5 she should be regarded as a widow who has obtained a certificate. [He referred to *Rex* v. *Albany Street Police Station Superintendent.* (1)]

*Lowenthal*, for the respondent. By s. 1, sub-s. 4, of the Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12), the onus is on the appellant to prove that he is not a German subject. The appellant relies on the provisions of the Naturalization Act, 1870, but that Act does not apply to this case at all. It was under the Aliens Act, 1844, that his father was naturalized, and a certificate of naturalization under that Act was granted under entirely different conditions from a certificate granted under the Act of 1870. Under the Act of 1844 the certificate contained restrictions which prevented the alien to whom it was granted being capable of becoming a member of the

(1) [1915] 3 K. B. 716.

Privy Council or of either House of Parliament, and it might contain further limitations: see s. 6. On the other hand, under s. 7 of the Act of 1870 an alien to whom a certificate of naturalization was granted was declared to be entitled to all the rights, powers, and privileges to which a natural-born British subject was entitled, and the only difference between a natural-born British subject and a naturalized subject was that the latter was not to be deemed to be a British subject while within the limits of the foreign State of which he was a subject previously to his obtaining his certificate, unless, indeed, he had ceased to be a subject of that State in pursuance of the laws thereof or in pursuance of a treaty to that effect. If a person naturalized previously to the passing of the Act of 1870 desired to avail himself of the provisions of the Act of 1870 he had to obtain a certificate under that Act: see clause 5 of s. 7. In *Rex* v. *Albany Street Police Station Superintendent* (1) it appeared that certificates had been granted under both Acts, and the Court dealt separately with the position under each.

Even, however, assuming that the Act of 1870 has any application to this case, the appellant could only obtain the status of a British subject under sub-s. 5 of s. 10, and, admittedly, the requirements of that sub-section have not been satisfied, for the appellant's mother never obtained a certificate of naturalization in the United Kingdom. Furthermore, even if it could be considered that she had obtained such a certificate, the fact that the appellant lived with her for two short periods did not make him a person who "during infancy has become resident" with his widowed mother in the United Kingdom.

*Waugh, K.C.*, in reply. By virtue of s. 16 of the Act of 1844 the appellant's mother became on her marriage a naturalized British subject and was entitled to all the rights and privileges of a natural-born subject. The Act of 1870 applied to persons naturalized under the Act of 1844, and clause 5 of s. 7, which enabled a person previously naturalized to apply for a certificate under that Act, was inserted merely for the purpose of enabling him to obtain those privileges which were excluded by the certificate granted under the Act of 1844. The Act of 1870 therefore applies to this case, and under sub-s. 5 of s. 10 the appellant is in law a British subject.

(1) [1915] 3 K. B. 716.

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DARLING J. In this case the appellant, who claims to be a British subject, is the son of an alien who in 1839 came to England, and in 1853 married the appellant's mother. In 1854 the father received a certificate of naturalization under the Aliens Act, 1844. I do not propose to say anything about that Act, because I think that this appeal fails without any regard to it. In 1858 the appellant's father, who had been for two years before that resident in Germany, went to Nuremberg, and he died there in 1887. The appellant was born in Nuremberg in February, 1875, and therefore, his parents being both then resident in Germany, he was not a British subject by virtue of the certificate of naturalization which his father had obtained. On the death of his father in 1887 the appellant came to England and lived with an elder sister and her husband. In 1890 his mother, she being then a widow, came to England, and it is found in the case that the appellant resided with her, he being then an infant. It is now said on his behalf that when his mother came to this country and he, being an infant, resided with her, he thereby became, by virtue of s. 10, sub-s. 5, of the Naturalization Act, 1870, a British subject and ceased to be an alien. I cannot accede to that argument. The sub-section in question says: "Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject." In my judgment the appellant fails for two reasons. First, because his mother never obtained a certificate of naturalization. It may be said that she did not require one as she was a British subject; that may be, but, in my opinion, in order to give the status of British nationality to her son she herself required to obtain a certificate of naturalization. Mr. Waugh, for the appellant, has contended that the certificate obtained by the appellant's father enured for both, and therefore that the mother obtained it. I do not agree. The father obtained a certificate, and the mother thereby became a naturalized British subject, but that was before she required to obtain a certificate for the purposes of s. 10, sub-s. 5. She never in fact obtained a certificate, and therefore the appellant, being the child of a widow who had not obtained a certificate of naturalization, does not come within the sub-section.

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Secondly, I think the sub-section means that, in order to give the status of British nationality to her infant child residing with her in the United Kingdom, the widow must obtain a certificate of naturalization after she becomes a widow. Inasmuch as the requirements of s. 10, sub-s. 5, have not been satisfied, the appellant remains what he was at first, an alien. The appeal therefore fails.

AVORY J. I am of the same opinion. In *Rex* v. *Albany Street Police Station Superintendent* (1) this Court decided that a child born in a foreign State prior to the commencement of the British Nationality and Status of Aliens Act, 1914, did not obtain the status of British nationality by the mere fact that his father was a naturalized British subject. Nor is it sufficient for the appellant to say that under the Aliens Act, 1844, under which his father was naturalized, the mother became entitled to all the rights and privileges of a natural-born British subject. The fact that she became entitled to those rights and privileges does not make her child born abroad a British subject. It only remains, therefore, to consider whether sub-s. 5 of s. 10 of the Naturalization Act, 1870, applies to this case. For the reasons given by Darling J. I agree that the sub-section does not apply. The appeal therefore fails.

HORRIDGE J. In the view I take of sub-s. 5 of s. 10 of the Act of 1870 it is unnecessary to consider whether a person naturalized under the Act of 1844 is entitled to the privileges conferred by the Act of 1870. So far as I am concerned, that must remain an open question. But, even assuming that a person so naturalized would be entitled to avail himself or herself of the Act of 1870, I do not think this appellant brings himself within sub-s. 5 of s. 10 of the Act of 1870. I prefer to rest my judgment upon the appellant's mother not having obtained a certificate of naturalization in the United Kingdom. This seems to me to be the safest ground upon which to base the decision.

*Appeal dismissed.*

Solicitors for appellant: *Wynne-Baxter & Keeble, for Hugh Hammond & Topham, Bradford.*

Solicitors for respondent: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

(1) [1915] 3 K. B. 716.

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*May* 2, 3, 19.

[IN THE COURT OF APPEAL.]

## HUGHES *v.* LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY.

[1915 H. 534.]

*Insurance, Life—Policy on Life of another—Absence of Insurable Interest—Contract induced by Fraudulent Representations — Recovery of Premiums paid—Life Assurance Act,* 1774 (14 *Geo.* 3, *c.* 48), *s.* 1—*Assurance Companies Act,* 1909 (9 *Edw.* 7, *c.* 49), *s.* 23; *s.* 36, *sub-s.* 3.

In 1908 and 1909 one Thomas effected with the defendants in their industrial branch five policies on the lives of others. Shortly afterwards Thomas determined not to keep the policies up, and he accordingly ceased paying the premiums and burnt the policies. At the end of 1910 one of the defendants' agents brought five duplicate policies to the plaintiff, who had no insurable interest in the lives in question, and induced her to take up the policies by the representation, which the jury found to be fraudulent, that by paying the arrears due on premiums and keeping them up everything would be all right. Thomas had not assigned the policies and did not ask for the duplicate policies, nor was he aware of what the agent was doing. The plaintiff, having discovered that the policies were illegal and void, sued to recover the premiums which she had paid :—

*Held*, that the parties were not in pari delicto, and that the plaintiff was entitled to recover, her right not being affected by ss. 23 and 36 of the Assurance Companies Act, 1909, which imposed a penalty upon a friendly society issuing such a policy.

*British Workman's and General Assurance Co.* v. *Cunliffe* (1902) 18 Times L. R. 425, 502, explained.

Appeal from the judgment of Scrutton J. on further consideration after the trial of the action with a jury at Swansea.

The following statement of facts is taken from the judgment of Swinfen Eady L.J. :—

" The plaintiff claims 52*l.* 13*s.* 6*d.* by way of return of premiums on life policies, which amount she contends was obtained from her by the fraudulent misrepresentations of the defendants' agents. At the trial the judge left certain questions to the jury, and, having obtained their findings of fact, he directed judgment to be entered for the defendants. The plaintiff appeals and contends that, upon

the findings of the jury, she is entitled to judgment against the defendant society for the amount claimed.

"In the years 1908 and 1909 John Henry Thomas, a grocer, effected with the defendants in their industrial branch five policies, namely, two on the life of Mrs. Elizabeth James, one on the life of James Morgan, and two on the life of Thomas Petty. The weekly premiums varied between 4*d.* and 1*s.*, and the total aggregate amount assured by the five policies was 65*l.* 8*s.* At the trial Thomas said that Mrs. Elizabeth James owed him money, but that the defendant society's local agent, the co-defendant William Evans, forced him to take out the policies on the other two lives, and added that a tradesman had to do that in many cases. William Evans, who was called by the society, said that all three lives were customers of John Henry Thomas, according to him. No question on this point was left to the jury. Assuming that J. H. Thomas had an insurable interest in all three lives, the policies taken out by him would be valid. Upon the face of each policy there is nothing to indicate that it is an assurance effected by one person on the life of another. Only the name of the assured is mentioned. After a short time Thomas determined to allow the policies to drop. He stopped paying premiums and burnt the policies. He never was asked to sell or to consent to the sale of the policies, and never asked for the issue of any duplicate policies. In December, 1910, the agent, William Evans, approached the plaintiff, Mrs. Hughes, whose husband keeps the Railway Inn at Maesteg, with a view to her keeping up the policies. There was a question at the trial whether the arrangement come to was with Mr. Hughes or with his wife the plaintiff, and the jury found that it was with the plaintiff.

"The plaintiff's account was that Lloyd, the defendants' superintendent, and Evans, the defendants' agent, came to her, that she was told that arrears of premiums were owing upon the policies, and that if she paid the arrears and the future premiums everything would be all right. She believed what she was told, and then and there paid the arrears of 3*l.* 14*s.* 2*d.* Subsequently Evans came alone, bringing with him five duplicate policies, which the plaintiff noticed were not the usual policies but duplicate copies, whereupon Evans assured her that everything would be all right, which assurance she believed, and paid the premiums on the policies which

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subsequently accrued. At a later date Lloyd left the society's service, and a new superintendent called upon the plaintiff, and after his visit she took advice, refused to pay any more premiums, and brought this action. The application to the head office to issue duplicate policies is a printed form filled up in the handwriting of Evans, and gives no reason why duplicate policies should be issued.

"We were told on the hearing of the appeal that the several proposals to the office to effect the original five policies had been destroyed, although these policies were taken out so recently as 1908 and 1909. Each policy contains a provision that the policy shall become void, and the society shall not be liable to pay any sum whatsoever on account of the assurance, and all premiums paid shall be forfeited to the society if the policy shall be in any way assigned, transferred, sold, charged, mortgaged, or otherwise parted with, nomination or will excepted.

"By rule 24 of the amended rules of the society the secretary is to keep a book in which the members may nominate in writing the person to whom the insurance money shall be paid on their decease, such person being the husband, wife, father, mother, child, brother or sister, nephew or niece of such member. Any member may revoke such nomination by a written notice to that effect signed by himself. No nomination was ever signed in respect of any of the five policies. It appears from this short statement of the facts that the plaintiff never acquired any valid title to any of the policies, or the moneys thereby assured, or any legal right to enforce payment by the insurance company on the death of any of the assured. No assignment of the policies was indeed ever agreed to be made by Thomas, who effected them, nor does it appear that he was aware of what Lloyd and Evans were doing with regard to them.

"The judge left the following questions to the jury:—(1.) Were the insurances in 1910 effected by Mrs. or Mr. Hughes? Answer: Mrs. Hughes. (2.) Was the effecting or transfer of the policies induced by any fraudulent representation of fact or law? If so, what was the representation and who made it? Answer: Yes. Assurances to Mrs. Hughes that by paying arrears due and keeping up the premiums everything would be all right. Made by Lloyd. (3.) Was the payment of premiums after the handing over of the duplicate policies induced by any fraudulent representation of fact

or law? If so, what was the representation and who made it? Answer: Yes. Assurances to Mrs. Hughes, when she knew that they were duplicate copies, that everything would be all right. Made by Evans."

The case was reserved for further consideration, the parties agreeing that the learned judge should have power to draw any inference of fact not inconsistent with the findings of the jury.

Scrutton J. on further consideration held that the plaintiff could not recover, even if the premiums had been obtained by fraudulent misrepresentation, as the Assurance Companies Act, 1909, s. 23 and s. 36, sub-s. 3, had prohibited under a penalty the issue of such policies. (1) He accordingly gave judgment for the defendants. The plaintiff appealed.

*Trevor Hunter*, for the plaintiff. The jury having found fraud, the parties are not in pari delicto; and the plaintiff's right to recover back the premiums paid is not affected if the society is liable to penalties for issuing void and illegal policies.

*Gore-Browne, K.C.*, and *Artemus Jones*, for the defendants. The assertion that "everything would be all right" was not a representation of fact but only of opinion. The plaintiff was accustomed to making insurances on other people's lives and must have understood the position, moreover the policies were on their face not assignable except by nomination or will. Further, the defendants' agents exceeded their authority.

*Cur. adv. vult.*

May 19. SWINFEN EADY L.J. read the following judgment:—

[After stating the facts as above set out the Lord Justice

(1) 9 Edw. 7, c. 49, s. 23: "Any assurance company which makes default in complying with any of the requirements of this Act shall be liable to a penalty not exceeding one hundred pounds . . . ."

Sect. 36, sub-s. 3: "Any collecting society" (which includes a friendly society) "or industrial insurance company which, after the passing of this Act, issues policies of insurance which are not within the legal powers of such society or company shall be held to have made default in complying with the requirements of this Act; and the provisions of this Act with respect to such default shall apply to collecting societies, industrial insurance companies, and their officers, in like manner as they apply to assurance companies and their officers."

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proceeded :] The judge during the course of his summing-up, and before leaving the second and third questions to the jury, had very carefully pointed out to them what would be a fraudulent statement and what would not ; also what would be a statement of fact and what would be only an expression of opinion as to the future ; the distinction between a statement which meant " You may trust to the honour of the society, you cannot recover in law, but you are safe in dealing with them, they are honourable people and will not take your money and not pay," and a statement which meant " You can recover in law on this policy." The judge told the jury that he had asked them whether there was any fraudulent misrepresentation of fact or law, and they must attend to that in the sense that he explained to them. The findings of the jury, therefore, amount to this, that the society by their agent had made representations which led the plaintiff to believe that the policies were valid and effectual in law, and that the plaintiff on paying became legally entitled to them, and that the plaintiff paid the arrears and continued to pay future premiums relying on these representations.

There is no complaint of the summing-up or of the findings of the jury, and it cannot be doubted that there was ample evidence for the jury to find fraud. Evans knew that the policies had been effected by Thomas, that Thomas had determined not to keep them up (although no notice of intention to forfeit had ever been given by the society under 59 & 60 Vict. c. 26, s. 3), and that Thomas had never been approached with a view to his assigning the policies ; assuming in favour of the defendants that they were assignable, and had been effected by a person having an insurable interest, the facts known to Evans showed that the plaintiff would acquire no title at all. The obtaining duplicate policies was a part of Evans's fraud, the personal gain to himself being that he would continue to receive a commission on the premiums which the plaintiff could be induced to pay.

In my judgment the present is a clear case of fraud, established to the satisfaction of the jury, and a much stronger case of fraud than *British Workman's and General Assurance Co.* v. *Cunliffe.* (1) In that case the policy was issued to Cunliffe upon the life of Peter Hampson, his brother-in-law, in which he had no insurable interest.

(1) 18 Times L. R. 425, 502.

The policy contained a reference to a proposal and declaration in writing signed by Cunliffe. No such proposal and declaration were put in evidence, and Cunliffe and his wife swore they had not signed such a document. Bibby, the insurance agent, knew that Cunliffe had no insurable interest in the life. The justices arrived at the conclusion that the society, by Bibby their agent, had made representations which led Cunliffe to believe that the policy would be valid and effective in law, and that Cunliffe had effected the policy and paid the premiums relying on these representations. The facts, as I have stated them, are taken from the case stated by the justices, which I have perused. The fraud there was pointed out by Vaughan Williams L.J. Bibby knew that by law it was necessary that the insurer should have an insurable interest in the life assured, and he knew that Cunliffe had no such interest in the life of his brother-in-law, yet to induce him to insure he made a statement of which the obvious meaning was that Cunliffe would be entitled to enforce payment of the policy money, though he had no insurable interest. This was fraud. In *Harse* v. *Pearl Life Assurance Co.* (1) Collins M.R. pointed out that the Court of Appeal in *British Workman's and General Assurance Co.* v. *Cunliffe* (2) affirmed the decision of the Divisional Court that the money could be recovered expressly on the ground that the statement on which the assured acted was fraudulently made. The facts of the present case afford much stronger evidence of fraud than the facts in *Cunliffe's Case* (2), and the fraud is established by the verdict of the jury.

I cannot part with this case without pointing out the extremely loose and careless manner in which, from the evidence given in this case, the business of the defendants would appear to be conducted. The society, by issuing duplicate policies without making due inquiry before doing so, enabled Evans to perpetrate the fraud. The application for the duplicate policies is in the handwriting of Evans and is signed only by him. No reason is given why duplicate policies were required, no statement made as to what had become of the originals, and no inquiry on the subject made of Thomas to whom the policies were issued. We know that Thomas had burnt the original policies when he determined not to keep them up, so that any inquiry of him by the society or any request for a letter

(1) [1904] 1 K. B. 558, 563. (2) 18 Times L. R. 425, 502.

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from him explaining why duplicate policies were asked for would probably have prevented the fraud from being perpetrated. Again, it appears from the society's memorandum, dated January 16, 1915, attached to Evans's demand for duplicate policies, that the original proposals for the insurances had then been destroyed ; no record remained of the persons who had effected the insurances, the policies upon the face of them merely stating the life assured. Original proposals should be retained and carefully preserved by the society until all claims in respect of the policies have been finally disposed of. The practice of persons in a humble position in life gambling in life assurance by effecting policies on the lives of persons in whom they have no insurable interest appears to be on the increase, and the system of paying agents by commission exposes them to the temptation (in order to increase their own remuneration) of representing either that such policies will be valid or will be paid, meaning the insurer to believe that the transactions will be legal.

In *Harse* v. *Pearl Life Assurance Co.* (1) and in *Evanson* v. *Crooks* (2) there was no fraud, and the plaintiff was in pari delicto and so failed to recover ; but those cases must not be regarded as deciding that where a person is induced to insure a life in which he has no insurable interest by an insurance agent making a misrepresentation of fact, or of mixed law and fact, the parties are necessarily in pari delicto. If insurance agents were carefully instructed not to procure or accept proposals for insurances on lives where the insurers have no insurable interest, there would not be so many actions brought for the return of premiums.

In this case the appeal should be allowed and judgment entered for the plaintiff for the amount claimed, with costs of the action and of this appeal.

PHILLIMORE L.J. read the following judgment :—The plaintiff sues for the recovery of money paid in premiums on five policies of insurance on the lives of three persons, alleging that it was money obtained by fraud, or alternatively paid on a consideration that failed. The defendant society denies her rights generally and specifically denies that it issued any policies to her, and further pleads that if the policies were issued to her " such policies were

(1) [1903] 2 K. B. 92 ; [1904] 1 K. B. 558. (2) (1911) 106 L. T. 264.

null and void and were illegal for want of insurable interest under 14 Geo. 3, c. 48, and the plaintiff was a party to such illegality and in pari delicto with the defendants, and moneys paid thereunder are irrecoverable in law."

The facts of the case are as follows: One J. H. Thomas, a grocer, had a debtor named Elizabeth James. He had also two customers, James Morgan and Thomas Petty. Upon the inducement of one William B. Evans, a collector of the defendant society, he effected two policies on the life of Mrs. James, in whose life he had an insurable interest, two policies on the life of Petty, and one on the life of Morgan. It seems to have been taken at the trial that in these latter lives he had no insurable interest. If so, the policies were illegal and void. He had paid the weekly premiums upon these policies for some time, but he got tired of doing so, and, notwithstanding the entreaties of Evans, he refused to keep them up. He burnt the policies and his premium books. Thereupon the collector, Evans, and the superintendent, Lloyd, went first to the plaintiff's husband and then to the plaintiff, suggesting that she should in some way take up these policies. The plaintiff had effected at different times a large number of similar policies on the lives of relations and connections by marriage, many of them outside the limits of protection given by the Friendly Societies Act, 1896, the Collecting Societies and Industrial Assurance Companies Act, 1896, and the Assurance Companies Act, 1909, without, as far as it appears, being aware that they were illegal and void. But she had some hazy idea that there was a limit to the power of insuring the life of another, and when this proposition was made to her she took the objection that those whose lives were proposed to be insured were not relations. For answer she was informed that the policies would be all right when the people died and she would get her money back. She was not to worry; Evans would bring premium books and policies together. Some time later Evans came and brought five copies of the original policies, marked on the outside as duplicates, and with a date at the bottom of "the 9th of March, 1911," which was the time of the transaction, but otherwise not distinguishable from the originals which had been torn up. The plaintiff noticed that they were not the usual policies, but Evans said that everything was all right and she was not to worry, gave her the papers,

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told her to keep the premiums up and everything would be all right, which she believed. Matters continued, the plaintiff paying premiums and getting in April, 1914, new premium books from Evans. Later on an inspector of the society came to see her, and then a new superintendent, Morgan Williams, who had taken the place of Lloyd, who had been dismissed. Various conversations took place between the plaintiff and her husband and these people which it is not necessary to go into. The result was that the plaintiff discovered that she had no title to recover under these policies, and she brought her action.

Now, the transaction which led to the plaintiff paying the premiums on these policies can be looked at in two ways. It was either one by which she—to use the language of Evans—took the old policies on, or it was a series of insurances de novo by her on the lives which had been previously assured by Thomas. In the former case two of the policies were good ones; the other three were taken to have been illegal and void. But they might have been good if the persons whose lives are assured had been debtors to Thomas, and there was no reason why the plaintiff should not suppose that they were, or accept the statement by the society's servants that they were, all right. But the plaintiff, having no title from Thomas, would have no right to the policies or the policy moneys. It is true that by virtue of the statute governing these matters no lapse of a policy can be effected without previous notice to the assured. But Thomas had abandoned the policies and had destroyed them and his premium books. And it was not with his consent that the application was made to Mrs. Hughes to take them over. Unless he assigned his interests under the policies, Mrs. Hughes would never get the policy moneys, and, if the case is to be regarded from this point of view, there was a clear fraud practised upon her by Evans and Lloyd, and no case of par delictum. Scrutton J., however, seems rather to have taken the view that the other aspect of the transaction was the right one, and that the plaintiff was effecting these five policies de novo.

There is considerable difficulty in this position. The request made to the plaintiff was to keep the policies on. The documents issued to her were copies or duplicates of the old policies with the old date, and, as I understand, with the age of the several assured

at the times when they were originally effected, and with the rate of premium appropriate to that age. It is difficult to see how the transaction can be regarded as one of the issue of new policies in 1910-1911. But assuming that the transaction is to be so regarded, which is looking at the case in the most favourable aspect to the defendant society, we have to consider the effect of the findings of the jury.

The learned judge left certain questions to the jury. These questions, with their answers, were as follows: [The Lord Justice read the questions and answers.] He then reserved the case for further consideration, it being agreed between the counsel on both sides that if any further fact was necessary to be found the judge should have power to find it. Upon further consideration he entered judgment for the defendant society. Hence this appeal.

There are two cases which have a special bearing upon the present —*British Workman's and General Assurance Co.* v. *Cunliffe* (1), decided in 1902, and *Harse* v. *Pearl Life Assurance Co.* (2) The only other case that I think it necessary to mention in this connection is *Howarth* v. *Pioneer Life Assurance Co.* (3) In the first of these three cases, which arose on appeal from a case stated by justices, there was in the view of the Lord Chief Justice at any rate no suggestion of fraud. He apparently decided upon the view that, though the contract was illegal and void, neither the agent nor the assured knew it; but that still the agent of the assurance company was not in the same position as the assured, he being a man who was, or might be believed to be, skilled in insurance matters. I am not quite sure that Channell J. did not take the view that there was direct misrepresentation by the agent. Darling J. is only reported as generally concurring. In the Court of Appeal it is again a little difficult to ascertain upon what grounds the decision of the Court below was affirmed and the assured held entitled to recover his premiums back. It is unfortunate that we have only the necessarily condensed newspaper report to guide us. It is, however, possible to infer from the brief report of the judgments of Vaughan Williams L.J. and Romer L.J., with whom Mathew L.J. is said to have concurred, that the view taken was that there was fraud on the

(1) 18 Times L. R. 425, 502. 1 K. B. 558.
(2) [1903] 2 K. B. 92; [1904] (3) (1912) 107 L. T. 155.

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part of the agent of the assurance company. Scrutton J. in his judgment in the present case observes that this could hardly be, inasmuch as both the Divisional Court and the Court of Appeal were bound as to facts by the findings of the justices, and the justices had not found fraud. As to this it may be remarked that no doubt the justices had not used the word fraud, but they had found facts from which it might have seemed to the Lords Justices right to draw an inference of fraud. For the purposes of the case before us the decision in this case of *Cunliffe* (1) is an authority that at any rate where an illegal contract of insurance is entered into, and the assured is ignorant of the law and is induced to enter into it by the fraudulent misrepresentation of the law by the agent of the assurance company, the parties are not in pari delicto and the assured may recover premiums paid. In *Harse's Case* (2), which was an appeal from a county court, the Divisional Court held that the premiums could be recovered; but the Court of Appeal reversed that decision. In that case, which was one of a son insuring against funeral expenses on the death of his mother, there had been some doubt as to the law, whether, that is, a son had not to this extent an insurable interest in the life of his mother. It was ultimately decided that he had not, and then later legislation—the Assurance Companies Act, 1909, s. 36—has provided that a son shall have such an interest. There was, therefore, no improbability in the agent having made a bona fide mistake as to the law, and this was in fact found by the jury. The Divisional Court thought that the assured was entitled to expect that the agent would know the law. The judges in that Court held that fraud was not essential, saying that they had so held (and two of the members of the Court were the same) in *Cunliffe's Case.* (1) In the Court of Appeal it was definitely decided that, seeing that the statement by the agent was not a statement of fact but one of law and was made innocently, the plaintiff could not recover. Collins M.R. said (3): "Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the

(1) 18 Times L. R. 425, 502. 1 K. B. 558.
(2) [1903] 2 K. B. 92; [1904] (3) [1904] 1 K. B. 563.

position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss." But at the same time the Court affirmed the view that if the element of fraud, or any of the other elements mentioned in the passage which I have just quoted, exists, the delictum is not par, and the premiums can be recovered back. In part support of his judgment the Master of the Rolls relied on *Cunliffe's Case* (1), which in his view was decided in the Court of Appeal upon the ground of fraud. Again I refer to Scrutton J.'s criticisms only to say that when one looks at a previous decision as an authority one has to accept the view of the facts which was taken by the tribunal. A Court is not bound by a previous decision as to the facts, but only by a previous decision so far as it lays down a principle of law. And, after full consideration of these two authorities, I think that there is no difficulty in ascertaining the rule of law, whatever may be the difficulties in the way of understanding how the conclusion came to be arrived at in *Cunliffe's Case* (1), according to the brief reports of it which we have. *Howarth* v. *Pioneer Life Assurance Co.* (2) seems to me a decision to the same effect.

Scrutton J. appears to have thought that nevertheless the plaintiff could not recover, and to have considered that at any rate the Assurance Companies Act, 1909, s. 23 and s. 36, sub-s. 3, making the offender liable to a serious penalty, outweighed all previous considerations. But if an act is illegal, that is, prohibited by law, it makes no difference whether it is prohibited under a penalty or left as an indictable misdemeanour at common law. There is as plain a prohibition in 14 Geo. 3, c. 48, on which the cases of *Cunliffe* (1) and *Harse* (3) were decided. It remains, I think, that the principles enunciated by Collins M.R. and agreed to by the Lords Justices in *Harse's Case* (4) carry the plaintiff home on the second view of the transaction.

Lastly, it was contended that the acts of the collector and superintendent were beyond the scope of their authority and could not bind the defendant society. But if the society repudiates the bargain it cannot keep the premiums. This was settled in the House

(1) 18 Times L. R. 425, 502.
(2) 107 L. T. 155.
(3) [1903] 2 K. B. 92; [1904] 1 K. B. 558.
(4) [1904] 1 K. B. 558.

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of Lords in *Refuge Assurance Co.* v. *Kettlewell.* (1) Scrutton J. pointed out this.

Whichever view, therefore, may be taken of the transaction by which the plaintiff obtained these duplicate policies in 1910-1911, I am of opinion that she is entitled to succeed, and that this appeal should be allowed.

BANKES L.J. read the following judgment:—In this action the plaintiff sought to recover certain premiums paid to the defendant society upon the ground that she had been induced to pay them by the false and fraudulent representations of the agents of the defendant society. The case was tried at Swansea before Scrutton J. and a jury. Questions were left to the jury which they answered favourably to the plaintiff, but in spite of the answers the learned judge entered judgment for the defendants. The question in this appeal is whether he was right in so doing.

It is not necessary that I should deal with the facts of the case, as they have been set out fully in the judgments which have already been delivered. It is sufficient for the purpose of my judgment to say that, having regard to the summing-up of the learned judge, the answers of the jury must be read as a finding that the representation by the defendants' agents was a representation that, if the plaintiff took over the policies and paid the premiums on them, they would be valid and binding policies in her hands and capable of being enforced by her, and that the agents at the time they made these representations knew them to be untrue, but that the plaintiff did not know them to be untrue, but, on the contrary, believed them to be true. On these findings the plaintiff was, in my opinion, entitled to judgment. Scrutton J. took the opposite view. It is clear from his judgment that though the defendant society's counsel submitted that the statements by the society's agents were only expressions of their opinion, and that the plaintiff was herself well aware of the true position, he refused to accept either contention in face of the findings of the jury, and, though he expressed an opinion with regard to one of the findings, he did deal with the case on the footing that the findings of the jury meant what I have interpreted them to mean. There is no cross-appeal asking the

(1) [1909] A. C. 243.

Court to set aside the findings, and this Court must, therefore, dispose of this appeal on the findings as they stand.

The ground upon which the learned judge decided in favour of the defendants was that the entire transaction was illegal, and, that being so, the plaintiff was not entitled to any relief. The learned judge appears to have relied on the recent Act of 9 Edw. 7, c. 49 (the Assurance Companies Act, 1909), in support of his view that the transaction was now penalized by statute. In my opinion this statute cannot be invoked to defeat the claim of the plaintiff. The statute applies to assurance companies, and lays down rules as to what they may do and what they may not do, and provides for penalties in cases of default; but it does not, so far as the present case is concerned, put the plaintiff in a worse position than she was in under the statute 14 Geo. 3, c. 48 (the Life Assurance Act, 1774). This statute certainly applied to these policies, if the transaction as between the plaintiff and the defendant society is to be treated as a re-issue, or a fresh issue, of the policies to her; and the effect of the illegality of a transaction as a result of that statute has been considered in several cases. In *Evanson* v. *Crooks* (1) Hamilton J., as he then was, held that a plea of the statute was a complete answer to a claim for the return of premiums in the absence of fraud. In a case where fraud is proved the authorities are, in my opinion, clear that the case cannot be considered as one of par delictum, and that an innocent plaintiff is entitled to recover. Scrutton J. commented on the difficulty of understanding the two cases of *British Workman's and General Assurance Co.* v. *Cunliffe* (2) and *Harse* v. *Pearl Life Assurance Co.* (3) As reported, it is impossible to understand them, except on the assumption that different views were taken of the justices' findings in *Cunliffe's Case* (2), and this is only one of the many instances which occur of the confusion which is created by the reporting of decisions which turn only upon the particular facts of the particular case and involve no general rule of law.

It appears to me, when the judgment of Vaughan Williams L.J. in *Cunliffe's Case* (2) is carefully looked at, that he read the findings of the justices in that case as amounting to a finding of fraud, for

(1) 106 L. T. 264. (2) 18 Times L. R. 425, 502.
(3) [1904] 1 K. B. 558.

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he says that the agent knew the law, and knew that the respondent had no insurable interest, and yet assured the respondent that the policy would be all right, which the justices interpreted as meaning "that the policy would be valid and effective in law." This, I think, must have been the view of Collins M.R. in *Harse* v. *Pearl Life Assurance Co.* (1) when he says that the Court affirmed the decision that the money could be recovered expressly on the ground that the statement on which the assured acted was fraudulently made. Whether any reasonable explanation of the conflicting views of the justices' findings in *Cunliffe's Case* (2) can be given seems to me to be immaterial in the present case. Given fraud, the authorities seem to me to be all one way, namely, that an innocent plaintiff is entitled to say that he is not in pari delicto with the defendants whose agents by a false and fraudulent representation induced him to believe that the transaction was an innocent one, and one which was enforceable in law. On these grounds, in my opinion, the appellant is entitled to succeed.

Another ground was mentioned during the course of the argument which seems open to the plaintiff, though not referred to by the learned judge in his judgment. The policies were all dropped policies at the time the plaintiff was induced to take them, as the defendants' agents must have known. Even if still in force they could not, by the conditions embodied in them, have been validly transferred to the plaintiff so as to give her a title to them. This also the defendants' agents must have known. The defendant society did not seek to justify the action of one of these agents, and, indeed, it was impossible to do so; but I cannot part with this case without expressing the hope that the defendant society will, in the future, exercise more care in the issuing of duplicate policies than they appear to have done in the present case.

*Appeal allowed.*

Solicitors for plaintiff: *Smith, Rundell & Dods, for J. R. Snape, Maesteg, Glamorgan.*

Solicitors for defendants: *J. Tickle & Co.*

(1) [1904] 1 K. B. 563. (2) 18 Times L. R. 502.

W. F. B.

## *In re* CRAIG & SONS.
## *Ex parte* HINCHCLIFFE.

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*June 7.*

*Bankruptcy—Execution Creditor—Levy by Sheriff—Landlord's Claim for Rent paid by Execution Creditor—Sale by Sheriff—Supervening Bankruptcy of Debtor—"Balance" of the Proceeds of Sale—Execution Creditor's Right to be recouped Sum paid for Rent—Duty of Trustee—Statute of* 8 *Anne, c.* 14, *s.* 1—*Bankruptcy Act*, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 41, *sub-s.* 2.

Sect. 1 of the statute of 8 Anne, c. 14, is not overridden by s. 41 of the Bankruptcy Act, 1914, except when the execution is itself avoided by the bankruptcy laws; and therefore "the balance" of the proceeds of sale of the goods of a debtor under an execution, which sub-s. 2 of s. 41 of the Bankruptcy Act, 1914, directs shall be paid over by the sheriff to the trustee in bankruptcy of the debtor, means the balance of the execution proper, that is, the balance after payment of the sheriff's costs. The sum (if any) paid by the execution creditor in discharge of the landlord's rent, which s. 1 of the statute 8 Anne, c. 14, directs the sheriff to levy and pay to the execution creditor, must be paid to him direct.

Where, therefore, an execution creditor, after levy by the sheriff on the goods of the debtor, paid 220*l.*, being the landlord's claim for rent, and the sheriff then sold but, the debtor's bankruptcy supervening, paid over the proceeds of sale to the trustee in bankruptcy after deducting only his costs of execution:—

*Held*, that the trustee had 220*l.* which formed no part of the debtor's estate, and the Court, applying the principle of *In re Condon* (1874) L. R. 9 Ch. 609, ordered the trustee to pay that sum to the execution creditor.

*In re Humphreys* (1870) 21 L. T. 684, *In re Cole* (1872) L. R. 14 Eq. 178, and *In re Ayshford* (1887) 4 Morrell, 164, distinguished.

THIS was an application by an execution creditor to be paid by the trustee 220*l.* out of the debtor's estate under these circumstances.

On July 29, 1915, the sheriff seized the goods of the debtor, who was trading as John Craig & Sons, under a writ of fi. fa. issued by J. H. Hinchcliffe, a judgment creditor of the debtor for 2700*l.* and costs. On July 30 the sheriff was served with a written notice on behalf of the landlords of the debtor's premises requiring him not to remove or sell any of the goods until payment of 220*l.*, being the amount of two quarters' rent in arrears due from the debtor to the landlords. Thereupon the sheriff refused to proceed under the writ

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of fi. fa. unless the 220*l.* was paid or provided for so as to remove the landlords' lien or right of distress upon the goods, and the landlords declined to agree to their rent being paid out of the proceeds of sale and also declined J. H. Hinchcliffe's suggestion that they should assign the arrears of rent to him. He had therefore either to withdraw his fi. fa. or to pay the landlords' claim for rent, and on August 5 he paid the sheriff 220*l.*, who paid over that sum to the landlords in satisfaction of their claim.

On August 13 the sheriff sold all the goods he had seized, and the sale realized a little over 1000*l.* The same day the debtor committed an act of bankruptcy by filing a declaration of his inability to pay his debts, on which act of bankruptcy certain creditors the same day presented a bankruptcy petition against the debtor. Notice of this act of bankruptcy and of the petition was at once given to the sheriff.

In November a receiving order was made against the debtor on the petition, and adjudication followed. The sheriff handed over to the trustee in bankruptcy through the official receiver the sum of 951*l.* 17*s.* 8*d.*, being the net proceeds of the sale (less the Board of Trade expenses), without paying thereout to J. H. Hinchcliffe the 220*l.* he had provided to satisfy the landlords' claim for rent. J. H. Hinchcliffe now applied for an order on the trustee to pay him this 220*l.*

*H. S. Cautley*, for Hinchcliffe. I rely on s. 1 of the statute of 8 Anne, c. 14, which, it is submitted, is not overridden by sub-s. 2 of s. 41 of the Bankruptcy Act, 1914. (1) The statute of Anne was

(1) Sect. 1 of the statute 8 Anne, c. 14, enacts: "No goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution: provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff, one

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considered with s. 11 of the Bankruptcy Act, 1890, which is the same as s. 41 of the Bankruptcy Act, 1914, in *In re Mackenzie*. (1) It was there held that the Bankruptcy Acts do not deprive the landlord of his rights under the statute of Anne, except where the execution is itself overridden and rendered void by the bankruptcy and the landlord has not distrained, and that is not this case. It was also decided that goods which belong to a judgment debtor and are seized by the sheriff, but which are impounded by the statute of Anne until the landlord is paid, are not "goods of a debtor" which have to be handed over by the sheriff to the trustee in bankruptcy under s. 11, nor are the proceeds of sale of such goods to be handed over free from the rights of the landlord. The trustee can only claim the benefit of the sale subject to those rights. Here so much of the goods impounded as realized the 220*l.* was no part of the "goods of the debtor," and that sum ought to have been handed over by the sheriff to the execution creditor who found the money to pay the rent. I rely on the concluding words of s. 1 of the statute of Anne, which directs the sheriff to pay to the execution creditor "as well the money so paid for rent as the execution money." The 220*l.* may perhaps be regarded as part of the sheriff's "costs of the execution" which are to be a first charge on the goods or proceeds. The point was raised in the arguments in reply in *In re Mackenzie* (2), but was not decided.

[HORRIDGE J. I think that is rather a far-fetched argument.]

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year's rent, may proceed to execute his judgment, as he might have done before the making of this Act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money."

The Bankruptcy Act, 1914, s. 41, sub-s. 2, enacts: "Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor."

(1) [1899] 2 Q. B. 566, 576.

(2) [1899] 2 Q. B. 572.

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It is submitted that the execution creditor ought to have been paid the 220*l.* out of the proceeds of sale. In the case of *In re Humphreys* (1) a distress for rent was paid out by an auctioneer at the request of some of the creditors, and the Court directed him to be repaid out of the first assets of the bankrupt. Lastly, the trustee has 220*l.* which forms no part of the debtor's estate, and the Court will direct its officer to do what is right and to pay over the money to the person entitled to it: *In re Condon* (2); *In re Tyler* (3); *In re Phillips.* (4)

*W. V. Ball*, for the trustee. This was a voluntary payment made by Hinchcliffe before the bankruptcy in his own interest and for his own benefit, and there is no case in which such a payment has been recouped out of the debtor's estate. *In re Humphreys* (1) and *In re Ayshford* (5) were both cases in which a payment made after the commencement of the bankruptcy at the request of creditors for the benefit of the estate was repaid, and in *In re Cole* (6) a creditor paid out the sheriff after adjudication and was repaid because the debtor's estate had benefited by the payment. But there is no rule of law which entitles a man, who makes a voluntary payment, to recover payment from the person who may happen to be benefited by it, and in *In re Ayshford* (7) Cave J. says that *In re Cole* (6) "goes to the very extreme limit." The principle of *In re Condon* (2) and that line of cases does not apply. But if it does, the remedy of Hinchcliffe is not against the trustee, but against the sheriff who paid away the 220*l.* to the wrong person. The statute of Anne impounds the goods and directs the sheriff to pay the landlord out of the proceeds. Here the landlords were paid several days before the sale, and there were no goods impounded at the date of the sale. Sub-s. 2 of s. 41 of the Bankruptcy Act, 1914, expressly provides that the sheriff shall pay over the balance of the proceeds of sale to the trustee, who is "entitled to retain the same as against the execution creditor," and that right of the trustee, it is submitted, is not taken away by *In re Mackenzie.* (8) The 220*l.* formed no part of the sheriff's costs of the execution.

(1) 21 L. T. 684.
(2) L. R. 9 Ch. 609.
(3) [1907] 1 K. B. 865.
(4) [1914] 2 K. B. 689.
(5) 4 Morrell, 164.
(6) L. R. 14 Eq. 178.
(7) 4 Morrell, 164, 168.
(8) [1899] 2 Q. B. 566, 577.

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HORRIDGE J. This case involves a difficult question, but I have formed a clear opinion upon it. It is a motion by a Mr. Hinchcliffe asking for an order upon the trustee of the estate to pay him "the sum of 220*l.* paid by him on the 5th August, 1915, to the sheriff of the city of London for payment to the landlords of the bankrupts for six months' rent then in arrear." The facts are these: [His Lordship stated the facts and continued:] The question I have to decide turns upon s. 1 of the statute of 8 Anne, c. 14, and s. 41, sub-s. 2, of the Bankruptcy Act, 1914. The statute of Anne provides that no goods or chattels whatsoever "shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution"; and then it provides the rent shall be limited to twelve months, which has now been reduced to six months. The case of *In re Mackenzie* (1) deals very comprehensively and clearly, if I may respectfully say so, with the effect of this statute, and, so far as this case requires, it comes to this—that under the statute no goods can be removed and they are therefore impounded until the rent is paid, and that if in fact they are sold by the consent of the landlord there is a well known and established practice that the sheriff will be ordered to pay out of the proceeds of sale the rent which is due to the landlord. The case also decides that the goods so impounded, whilst they are so impounded and until the rent is paid, do not pass to the trustee in bankruptcy. The Master of the Rolls says: "Goods which belong to a judgment debtor and are seized by the sheriff, but which are impounded by the statute of Anne until the landlord is paid, are not 'goods of a debtor' which have to be handed over by the sheriff to the trustee in bankruptcy under s. 11." It does not say, nor does the case decide, that where the impounding has come to an end by the act of the execution creditor in paying the rent the goods are not then goods which pass to the trustee in bankruptcy under the provisions of s. 41, sub-s. 2, of the Bankruptcy Act,

(1) [1899] 2 Q. B. 566, 577.

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1914. That is the problem I have to solve, and I can only do it by reading the two statutory provisions together. Now s. 1 of the statute of Anne goes on to say: "and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money." That provision does not say that out of the proceeds of the execution the money is to be paid to the execution creditor, but it gives an express power to the sheriff to levy for money which has been paid by the execution creditor for rent, and directs that that money as well as the execution money shall be paid to the creditor. Then, turning to sub-s. 2 of s. 41 of the Bankruptcy Act, 1914, it says: "Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor." Therefore there is a statutory enactment that the balance, when paid, is to be retained against the execution creditor; and the question is, What is "the balance"? Is it the whole amount which has been received in respect of both levies, the levy under the execution and the levy under the statute of Anne after deducting the sheriff's costs, or is it only to be the proceeds of the execution itself, as distinguished from the proceeds of the levy under the statute of Anne, after deducting the costs? I think the true view is that it is only the proceeds of the execution proper, and that the obligation to pay to the execution creditor the proceeds of the levy under the statute of Anne is left entirely unaffected. I think this ought to be paid first before the proceeds of the execution are handed to the trustee, because the statute of Anne puts it first, and says the sheriff shall pay "to the plaintiff as well the money so paid for rent as the execution money." I think it is quite clear that the execution money can only be ascertained after the amount has been deducted from the proceeds of the sale which is represented by the

rent paid. Therefore the rent must come out first in order to ascertain what are the proceeds of the execution. I am strengthened in this view because, if the proceeds of the execution under s. 41, sub-s. 2, mean that the whole proceeds of both levies less the sheriff's costs are to be handed to the trustee and held by him as against the execution creditor, then in a case where a full execution has been realized, including the moneys paid to the landlord and the costs of execution, the total sum so levied, after deducting the costs, would have to be handed to the trustee, and he would make money out of the fact that the execution creditor had paid off the landlord. I think the true view is that the money which has to be paid to the trustee is the proceeds of the execution proper, which can only be ascertained after the levy under the statute and the money paid to the landlord under the statute has been met and its proceeds handed to the execution creditor. In this case I think the strict right of the applicant would be to take proceedings against the sheriff and say his payment to the trustee was wrong, but in that case the payment by the sheriff to the trustee would be a payment made in mistake of law and the principle of *In re C ndon* (1) would have applied, and the Court would order the trustee to repay the sheriff. I am not going to do that. I think I have the right to say that, inasmuch as I am satisfied the trustee has got something that he ought not to have, I can order him in conscience to pay it directly to the person who is entitled to receive it.

I wish to add a few words on the line of authorities represented by *In re Cole* (2), *In re Humphreys* (3), and *In re Ayshford.* (4) All those cases seem to me to turn on the fact that the payment in each of them was made after the bankruptcy commenced and was treated by the Court as a payment made for the benefit and on behalf of the estate. The case of *In re Cole* (2), as was pointed out by Cave J. in *In re Ayshford* (4), has gone to the very extreme limit, as he puts it, but at any rate that case can be distinguished from this, inasmuch as although the payment was made voluntarily it was made at a time when the estate had already gone into bankruptcy, and the Court treated it as a payment made on behalf of the estate. But in the other two cases there was distinct evidence before the Court

(1) L. R. 9 Ch. 609.
(2) L. R. 14 Eq. 178.
(3) 21 L. T. 684.
(4) 4 Morrell, 164.

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that the creditors had assented to the payment before it was made. Those three cases are, I think, entirely distinguishable. I base my judgment on the construction of s. 1 of the statute of Anne coupled with s. 41, sub-s. 2, of the Bankruptcy Act, 1914, and I direct the trustee to pay to the applicant the sum asked for and his costs of the motion.

Solicitors for applicant : *Jaques & Co., for Ratcliffe & Greenwood, Bradford.*

Solicitors for trustee : *Stannard & Bosanquet.*

H. L. F.

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*June* 5.

## STOTT AND ANOTHER *v.* GAMBLE AND OTHERS.

[1915 S. 3049.]

*Cinematograph—Licence Conditions of Licence—Reasonable Conditions —Validity of Licence—Interference with Contractual Rights—Just Cause or Excuse.*

A licensing authority under the Cinematograph Act, 1909, licensed the proprietors of a theatre to use it for the exhibition of cinematograph films. The licence was subject to the following condition :— "No film shall be shown that is objectionable or indecent or anything likely or tending to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace, and no offensive representations of living persons shall be shown. Provided also that no film shall be exhibited if notice that the justices "— i.e., the licensing authority—" object to such film has been given to the licensee."

Grantees of the right of letting for exhibition a certain film agreed to let the film to the proprietors of the theatre for an agreed sum. The licensing authority gave notice to the proprietors of the theatre that they objected to the exhibition of the film. In an action by the grantees against the licensing authority for interfering with their contractual rights without just cause or excuse :—

*Held*, that the meaning of the condition was that the licensing authority might give notice of objection to a film where they had bona fide and in the judicial exercise of their discretion come to the conclusion that the film was objectionable on one of the grounds mentioned therein, and that so interpreted the condition was reasonable and valid.

*Held*, also, that, even if the condition was unreasonable and void, the grantees had no cause of action, inasmuch as there was no

evidence that the licensing authority knowingly or for their own ends induced the licensees to commit an actionable wrong.

Dicta of Lord Watson in *Allen* v. *Flood* [1898] A. C. 1, 96, and Buckley L.J. in *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* [1908] 1 Ch. 335, 359, followed.

TRIAL of action before Horridge J. at Liverpool Assizes.

The plaintiffs, who carried on business as "The National Film Agency," had acquired the sole right of letting out on hire for exhibition in Lancashire and elsewhere a film known as "Five Nights."

The defendants were justices of the county borough of St. Helens sitting in petty sessions, to whom, under ss. 5 and 6 of the Cinematograph Act, 1909 (9 Edw. 7, c. 30), the council of the borough had delegated the powers conferred upon the council by ss. 2 and 6 of the Act of granting licences for cinematograph exhibitions. The defendants had granted to the manager of a theatre called the St. Helens Hippodrome, of which the Hippodrome (St. Helens) Limited, were the proprietors, a licence authorizing the use of the theatre for the purposes of such exhibitions subject to the following among other conditions :—

"5. No film shall be shown that is objectionable or indecent or anything likely or tending to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace, and no offensive representations of living persons shall be shown. Provided also that no film shall be exhibited if notice that the justices object to such film has been given to the licensee."

"46. For every breach of any of these rules or of any of the regulations of the Secretary of State by the owner of the cinematograph or by the occupier of the premises who allows his premises to be used in contravention thereof, there shall be forfeited and paid a sum of not exceeding 20*l.* and a further sum of not exceeding 5*l.* for each day during which the offence continues, and this licence may also be revoked."

In August, 1915, the plaintiffs entered into a contract in writing with the Hippodrome Company to let to the company, who agreed to hire for the sum of 40*l.*, a copy of the film "Five Nights" to be exhibited during the week ending October 9, 1915, at the St. Helens Hippodrome.

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On October 4 the defendants attended at the Hippodrome and viewed the film which was about to be exhibited under the above contract. On the same day they instructed their clerk to write and he wrote to the manager of the Hippodrome a letter in the following terms :—

" With reference to the film of ' Five Nights ' which the magistrates inspected this morning, I am instructed to give notice that under s. 5 of the rules they object to such film being shown and consequently it must not be staged." By " s. 5 of the rules " was meant condition 5 set out above.

In consequence of this letter the Hippodrome Company abandoned the intended exhibition of the film. On the same day they informed the plaintiffs of the notice and told them that the film was not being exhibited.

The plaintiffs brought this action. They contended that condition 5 attached to the licence granted to the Hippodrome Company was unreasonable and did not justify the defendants in giving the notice prohibiting the exhibition ; and they alleged that the defendants by so doing had without just cause or excuse interfered with the contractual rights of the plaintiffs under the contract of August, 1915, with the Hippodrome Company.

The defendants contended that condition 5 was reasonable and justified them in giving the notice.

It was admitted that the 40*l.* mentioned in the agreement of August, 1915, was not in fact paid to the plaintiffs because of the notice given by the defendants, and it was agreed that, if the plaintiffs were entitled to succeed, the damages should be this sum of 40*l.*

*Cyril Atkinson, K.C.*, and *T. G. R. Dehn*, for the plaintiffs.
*Gibbons, K.C.*, and *Acton*, for the defendants.

June 5. HORRIDGE J. delivered a written judgment which, after stating the facts, proceeded as follows : It was contended before me that the condition No. 5 attached to the licence was unreasonable inasmuch as the jurisdiction of the magistrates in granting the licence was administrative and not judicial, and that by the condition they made themselves the sole judges without hearing the

parties as to whether or not the film was objectionable, and in the event of the licensee not complying with a notice not to exhibit he became liable, under condition 46, to penalties.

It was decided in the case of *Huish* v. *Liverpool Justices* (1) that justices at petty sessions exercising delegated powers were not sitting as a Court of summary jurisdiction so as to enable an order to be made upon them to state a case. In the case of *London County Council* v. *Bermondsey Bioscope Co.* (2) Pickford J. says "The County Council might impose such conditions, so long as they were not unreasonable, as they thought right"; and Lord Alverstone C.J. uses similar language.

In *Theatre de Luxe* (*Halifax*) v. *Gledhill* (3) the majority of the Court held that certain conditions attached to a licence were unreasonable. In giving judgment Lush J. said (4): "Mr. Montgomery also conceded that the condition must be reasonable having regard to the conduct of the licensed premises, or in other words that it must be a reasonable condition having regard to the subject-matter of the licence, and if this condition were reasonable having regard to the subject-matter of the licence, namely, the use by the licensee of these premises for cinematograph exhibitions, it would be very difficult for us to say that it was in excess of the powers of the licensing authority."

The question I have to consider is whether condition 5 is reasonable having regard to the subject-matter of the licence. In the case of *Ex parte Stott* (5) an application was made to a Divisional Court for a rule nisi for a writ of certiorari to bring up the justices' notice in this case. The Court held that persons in the plaintiffs' position were not parties aggrieved, and the contention in that case was urged that this particular condition was unreasonable. Avory J. said (6): "I may say that I think the last clause of the condition means that the justices may give notice of objection to a film where they have bona fide and in the judicial exercise of their discretion come to the conclusion that it is objectionable on one of the grounds mentioned in the previous part of the condition. If that is the true meaning of the condition the objection to it disappears."

(1) [1914] 1 K. B. 109.
(2) [1911] 1 K. B. 445, 453.
(3) [1915] 2 K. B. 49.
(4) [1915] 2 K. B. 55.
(5) [1916] 1 K. B. 7.
(6) [1916] 1 K. B. 9.

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I think this is the true meaning of the condition. I think it is most desirable and quite reasonable that justices should, when granting a licence, put in a condition retaining to themselves power to stop the exhibition of any film which they think is objectionable upon the grounds mentioned in the condition. I therefore think the justices' notice in this case was given rightly and legally and no one has any cause of complaint in respect of it.

If, however, I am wrong in this view I still think the plaintiffs are unable to recover. The way in which their case was put is this: It was said the giving of the notice was a wrongful act and such an act as might, as a natural and probable consequence of it, produce injury to another and which did produce injury to the plaintiffs. In the first place I do not think that it at all follows that it would cause injury to the plaintiffs. If the notice was a bad notice the licensee might have ignored it, and he must be presumed in law to know it was an illegal notice if in fact it was. Further, even if the natural effect of the notice was to prevent the licensee from giving the performance and to cause him not to pay 40*l.*, I do not think this gives any right of action to the plaintiffs. The line of cases relied upon was the one of which *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1) is an example. In the judgment of Buckley L.J. in *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (2) he says: "I take the law which I have to apply from two passages which I will read. In *Allen* v. *Flood* (3) Lord Watson says: 'There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (4), the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.'"

In my view this case clearly does not fall within the second class

(1) [1905] A. C. 239.
(2) [1908] 1 Ch. 335, 359.
(3) [1898] A. C. 1, 96.
(4) (1853) 2 E. & B. 216.

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where the object has been procured by illegal means directed against a third party, and therefore must, if there is here any cause of action, fall within the first proposition, namely, "he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong."

I see no evidence that the defendants knowingly or for their own ends induced a person to commit an actionable wrong. It is quite different from such cases as *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1), where, although possibly for a personal object and not to injure, the defendants had directly induced the miners to break their contracts.

In my view this action fails and judgment must be entered for the defendants with costs as between solicitor and client.

*Judgment for defendants.*

Solicitors for plaintiffs : *Field & Cunningham, Manchester.*

Solicitors for defendants : *Cobbett, Wheeler & Cobbett, for Bertram Brewis, Manchester.*

(1) [1905] A. C. 239.

W. H. G.

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*June* 5.

## *In re* SALMON.

## *Ex parte* THE OFFICIAL RECEIVER.

*Bankruptcy—Summary Administration—Release of Trustee—After-acquired Property—Administration and Distribution—Employment of Solicitor—Powers of Official Receiver as Trustee—Permission of Board of Trade—Powers of Creditors—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 121—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 20, *sub-s.* 10; *s.* 56, *sub-s.* 3; *s.* 79, *sub-s.* 1; *s.* 129.

In the case of a summary administration and adjudication in bankruptcy under s. 121 of the Bankruptcy Act, 1883, or s. 129 of the Bankruptcy Act, 1914, where the official receiver as trustee has been released under s. 93 of the later Act and continues to act under sub-s. 4 of that section, the Board of Trade is by s. 20, sub-s. 10, of that Act the proper authority to give permission to the official receiver as trustee to employ a solicitor under s. 56, sub-s. 3, of the Act.

Sect. 79, which directs the trustee, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, to have regard to any directions given by resolution of the creditors at a general meeting, is "subject to the provisions of this Act," including the provisions of the Act of 1914 mentioned above. Consequently an official receiver acting as trustee under s. 93, sub-s. 4, need not have regard to any directions of the creditors as to whom he shall employ as solicitor.

*Semble* that the employment of a solicitor is not a matter "in the administration of the property of the bankrupt or the distribution thereof amongst his creditors" within the meaning of s. 79.

*In re Geiger* [1915] 1 K. B. 439 followed.

*In re Consolidated Diesel Engine Manufacturers* [1915 1 Ch. 192 questioned.

Appeal from the county court of Surrey holden at Croydon.

On March 24, 1916, an application was made to the county court by the official receiver, as the trustee in bankruptcy of H. J. Salmon, for directions in the following circumstances:—

On July 9, 1893, a receiving order was made against H. J. Salmon and on July 25, 1893, he was adjudicated a bankrupt. On August 17, 1893, an order for summary administration was made under s. 121 of the Bankruptcy Act, 1883, which is now s. 129 of the Bankruptcy Act, 1914. (1) The first meeting of creditors was held on August 23, 1893. No resolution was passed at that meeting, and the official

(1) See note on p. 517, post.

receiver remained trustee of the estate. On February 6, 1895, the Board of Trade made an order releasing the official receiver in his character of trustee.

On July 5, 1915, the bankrupt became entitled for life to the income of certain trust funds to the corpus of which his infant children were presumptively entitled subject to his life interest. In December, 1915, the official receiver issued to all the creditors mentioned in the bankrupt's statement of affairs notices of a meeting to be held on January 4, 1916, to consider the position. The meeting was held, and the creditors present resolved that four of their number should act as a committee to advise the official receiver and that pending further negotiations he should in his discretion make a weekly allowance to the bankrupt. Certain questions having arisen as to the power of the trustees of the settled funds to raise portions of the capital for the benefit of the children of the bankrupt, the official receiver applied to the Board of Trade under s. 20, sub-s. 10, s. 56, sub-s. 3, and s. 129, sub-s. 2 (l.), for permission to employ Messrs. Tarry, Sherlock & King, solicitors, to advise him as to his rights as trustee of the bankrupt's estate. On January 10, 1916, the Board of Trade by order sanctioned the appointment of Messrs. Tarry, Sherlock & King in that matter, and a retainer to that firm was accordingly issued.

In the meantime the solicitors for the bankrupt had laid a case before counsel, who stated that in his opinion the trustees of the settled funds were empowered to raise one half of the capital for the benefit of the bankrupt's children. They sent a copy of this opinion to the official receiver and informed him that they were about to issue an originating summons to have the matter decided by the Court. The official receiver, having submitted the opinion to Messrs. Tarry, Sherlock & King, called a meeting of the committee of creditors. The meeting was held on January 27. The committee decided that the opinion should not be accepted and that Messrs. Cohen & Cohen should be appointed as solicitors to the official receiver, and that, failing such appointment, a meeting of creditors should be called to elect a trustee other than the official receiver. On the following day the official receiver wrote to Messrs. Cohen & Cohen saying that the creditors had no power to elect a trustee after the release of the trustee by the Board of Trade and that he was

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satisfied with the advice of Messrs. Tarry, Sherlock & King, who had already been retained in the matter.

On January 28 the solicitors for the bankrupt served upon the official receiver an originating summons on behalf of the children of the bankrupt for an order that the trustees of the settled funds should raise out of the capital thereof in priority to the bankrupt's life interest such sum not exceeding one half as the Court should think fit. The official receiver applied for and obtained the sanction of the Board of Trade for the appointment of Messrs. Tarry, Sherlock & King to act for him in entering an appearance to this summons, and that firm were retained accordingly.

At the instance of a number of the creditors the official receiver called a meeting of all the creditors for the purpose of considering and, if thought fit, passing a resolution that the trustee should appoint Messrs. Cohen & Cohen as his solicitors in the bankruptcy. With the notice to each creditor the official receiver sent a circular informing the creditor that the appointment of Messrs. Tarry, Sherlock & King had been made as provided by s. 56 and s. 20, sub-s. 10, of the Bankruptcy Act, 1914; that he was quite satisfied with their advice and content to continue their employment. The meeting was held on March 10, 1916. Before the resolution was put the official receiver informed the meeting that a resolution of creditors for the appointment of solicitors other than those retained in accordance with the provisions of the Bankruptcy Act, 1914, would, as he was advised, be ineffective, as such an appointment did not come within s. 79, sub-s. 1, of the Act; he also said that if the resolution was carried he would apply to the Court for directions. The resolution was then put to the meeting and carried.

The official receiver accordingly applied to the Court for directions, submitting that, as there was no committee of inspection, the Board of Trade alone could give permission to the trustee to employ a solicitor; that s. 79 of the Bankruptcy Act, 1914, was subject to the provisions of that Act and only applied to the administration and distribution of the property of the bankrupt; and that, in so far as the resolution purported to override the permission given by the Board of Trade and to be a direction to the official receiver, the same was ineffective and might be disregarded.

The motion was heard on March 24, 1916, before the registrar of

the Croydon County Court, who refused the application on the grounds (1.) that he had no right to give any such direction on the facts of the case, and (2.) that if he had such a right it ought not to be exercised in granting the application.

The official receiver appealed.

*E. W. Hansell*, for the official receiver. There having been an order for summary administration, and the debtor having been adjudged bankrupt, the official receiver became the trustee in bankruptcy and there was and is no committee of inspection: Bankruptcy Act, 1883, s. 121, sub-ss. 1, 2. Where there is no committee of inspection any direction or permission required to be given by a committee of inspection may be given by the Board of Trade on the application of the trustee: Bankruptcy Act, 1914, s. 20, sub-s. 10. One thing for which the permission is required to be given by a committee of inspection is the employment of a solicitor: Bankruptcy Act, 1914, s. 56, sub-s. 3. Therefore the trustee with the permission of the Board of Trade is the proper person to appoint a solicitor. The official receiver is the trustee: Bankruptcy Act, 1914, s. 93, sub-s. 4. Therefore he has properly appointed Messrs. Tarry, Sherlock & King. It is said that by s. 79 the trustee must have regard to any directions given by resolution of the creditors. There are two answers to that: (1.) Sect. 79 is expressly "subject to the provisions of this Act," including the provisions mentioned above; (2.) the section only applies "in the administration of the property of the bankrupt and the distribution thereof amongst his creditors." The appointment of a solicitor is neither one nor the other: *In re Geiger*. (1)

*F. Mellor*, for the creditors. The creditors are entitled under s. 79 to give directions and the trustee is to have regard to them. In the case of any conflict between the committee of inspection and the creditors at a general meeting the directions given by the creditors are to override any directions given by a committee of inspection. In *In re Consolidated Diesel Engine Manufacturers* (2) Neville J. held that a liquidator of a company was bound to have regard to the wishes of the committee of inspection in the appointment of a solicitor under s. 158, sub-s. 1, of the Companies (Consolidation) Act,

(1) [1915] 1 K. B. 439. (2) [1915] 1 Ch. 192.

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1908, which is to all intents the same as s. 79 of the Bankruptcy Act, 1914, and that the directions of the creditors would, in case of conflict, override the directions of a committee of inspection.

The only question is whether the appointment of a solicitor is a matter "in the administration of the property of the bankrupt and the distribution thereof amongst his creditors" within the meaning of s. 79. The administrator must necessarily in certain cases invoke legal assistance. Sect. 56, which authorizes the employment of a solicitor, occurs in Part II. of the Act, which is headed "Administration of Property."

HORRIDGE J. This is a case of summary administration under s. 121 of the Act of 1883, which is now s. 129 of the Act of 1914. In such a case the Act says that "there shall be no committee of inspection, but the official receiver may do with the permission of the Board of Trade all things which may be done by the trustee with the permission of the committee of inspection." One of the things which a trustee may do with the permission of the committee of inspection is under s. 56, sub-s. 3, to employ a solicitor to take any proceedings or do any business which may be sanctioned by the committee. In this case the official receiver as trustee of the estate has got his release, and therefore by s. 93, sub-s. 4, the official receiver is the trustee, and he is trustee without a committee of inspection, and instead of the permission of a committee of inspection he has to get the permission of the Board of Trade. He applied for and got permission from the Board of Trade to appoint Messrs. Tarry, Sherlock & King, and has appointed that firm. Now the creditors have passed a resolution that he shall appoint Messrs. Cohen & Cohen; and the question on which we are asked for directions is whether or not that resolution has any effect on the appointment which has already been made by the leave of the Board of Trade.

Sect. 79 deals with the matter. It provides that "subject to the provisions of this Act, the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any direction so given by the creditors at any general meeting shall, in case of conflict, be deemed to override

any directions given by the committee of inspection." This enactment was considered in *In re Geiger.* (1) In that case there was only one creditor who purported to act as a committee of inspection and to sanction the employment of a firm of solicitors. In the Court of Appeal the point was made that one creditor could not be a committee of inspection; that point was met by the argument that a single creditor, like the general body of creditors, could override the committee of inspection. Kennedy L.J. dealt with the point thus raised (2): "The view of the Board of Trade apparently is that if there is a creditor, be it only one, he can give sanction to any matter which, under s. 57,"—scil. of the Act of 1883, similar to s. 56 of the Act of 1914—"requires the sanction of the committee of inspection. The only provision which might lend colour to this view appears to me to be s. 89,"—s. 79 of the Act of 1914—"which gives power to creditors by resolution to override directions given by a committee of inspection. But this is limited to the administration of the property of the bankrupt, and the distribution thereof amongst his creditors according to the words of the section, and no inference drawn from this can, as it appears to me, be preferred to that which arises from s. 57 read with s. 22, sub-s. 9,"—s. 20, sub-s. 10, of the Act of 1914—"and the absence of any provision in terms authorizing either a creditor or a number of creditors to sanction the action of the trustee in respect of any of the matters mentioned in s. 57 leads to the same conclusion. If this be so, the advice of the Board of Trade in the letter of May 6, 1913, was incorrect so far as the particular matters with which we are concerned stand, and this trustee had no authority under the statute for retaining the solicitors as he did." Swinfen Eady L.J. said (3): "Reliance was then placed by the trustee on s. 89, sub-s. 1, of the Bankruptcy Act, which enables the creditors to override any directions of the committee of inspection, and it was urged that, even if there had been a committee of inspection, the direction of Mr. Partridge, as sole creditor, would in case of conflict prevail, and he sanctioned the employment of a solicitor. The answer to this argument is that there is not any case of conflict, there was no committee of inspection, and, moreover, the subsection begins 'Subject to the provisions of this Act,' and one of

(1) [1915] 1 K. B. 439. (2) [1915] 1 K. B. 450.
(3) [1915] 1 K. B. 456.

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these provisions is that where there is not any committee of inspection the permission of the Board of Trade is necessary to the employment of a solicitor." It seems to me the consent of the Board of Trade was "necessary to the appointment of" the solicitors in this case within the meaning of the language of Swinfen Eady L.J., and both Kennedy and Swinfen Eady L.JJ. say that the provisions of the Act relating to the appointment of a solicitor are excluded from the operation of s. 89 of the Act of 1883, which is the same as s. 79 of the Act now in force, by the words "subject to the provisions of this Act," and that the creditors cannot in the case of such an appointment override the directions given by the committee of inspection or the Board of Trade. It is said that in *In re Consolidated Diesel Engine Manufacturers* (1) Neville J. held that in the winding up of a company the creditors would have the right to override the discretion of a committee of inspection in the appointment of a solicitor. That opinion of the learned judge was not necessary to his decision; and if the ratio decidendi was intended to cover it I hardly think the decision would have been the same if the authority of *In re Geiger* (2), which had not yet been decided, had been before the Court. The direction which we give is that the resolution of the creditors of March 10, 1916, is ultra vires and ought to be disregarded.

ROWLATT J. I am of the same opinion. In the situation in which this bankruptcy stands, and in view of the joint operation of ss. 56 and 129 of the Act of 1914, the effect of s. 79 is that, subject to the provision that the trustee may with the permission of the Board of Trade employ a solicitor, the trustee shall have regard to any directions given by resolution of the creditors in the administration and distribution of the property of the bankrupt. The proper direction therefore is that the trustee is not to have regard to the direction of the creditors in appointing a solicitor. That was the view of Kennedy and Swinfen Eady L.JJ. in *In re Geiger*. (2)

*Appeal allowed.*

Solicitor for appellant: *The Solicitor to the Board of Trade.*
Solicitors for respondents: *Cohen & Cohen.*

(1) [1915] 1 Ch. 192. (2) [1915] 1 K. B. 439.

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NOTE.—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121 (s. 129 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59)): "When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise, or the official receiver reports to the Court that the property of the debtor is not likely to exceed in value 300*l.*, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications:—

"(1.) If the debtor is adjudged bankrupt the official receiver shall be the trustee in the bankruptcy;

"(2.) There shall be no committee of inspection, but the official receiver may do with the permission of the Board of Trade all things which may be done by the trustee with the permission of the committee of inspection; . . . .

"Provided that the creditors may at any time, by special resolution, resolve that some person other than the official receiver be appointed trustee in the bankruptcy, and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made."

Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 20: "(1.) The creditors qualified to vote may, at their first or any subsequent meeting by resolution, appoint a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee. . . . .

"(10.) If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee."

Sect. 56: "The trustee may, with the permission of the committee of inspection, do all or any of the following things:— . . . . (3.) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection."

Sect. 79: "(1.) Subject to the provisions of this Act, the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection."

Sect. 93: "(1.) When the trustee has realised all the property of the bankrupt, or so much thereof as can, in his opinion, be realised without needlessly protracting the trusteeship, and distributed a final dividend, if any, . . . . the Board of Trade shall, on his application, cause a report on his accounts to be prepared, . . . . and shall either grant or withhold the release accordingly, . . . .

"(3.) An order of the Board releasing the trustee shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof

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that it was obtained by fraud or by suppression or concealment of any material fact.

"(4.) The foregoing provisions of this section shall apply to an official receiver when he is, or is acting as, trustee, and when an official receiver has been released under this section . . . . he shall continue to act as trustee for any subsequent purposes of the administration of the debtor's estate . . . .

"(5.) Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee."

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*April* 14, 17, 18, 19.

[IN THE COURT OF APPEAL.]

## ELLIOTT *v.* C. P. ROBERTS & CO., LIMITED.

[1915 E. 162.]

*Negligence—Contract to rebuild Premises—Power reserved to Building Owner to give Special Work to Special Tradesmen—Such Tradesmen declared to be Sub-contractors employed by the Contractor—Clause that Contractor shall allow reasonable Use of any Scaffolding by other Tradesmen—Duty of Contractor towards Workmen employed by other Tradesmen—Invitation.*

The defendants (called "the contractor") entered into a contract with the London County Council to remodel and enlarge a school building for a lump sum in accordance with the specification in the schedule thereto. This sum included certain sums for special work, e.g., a sum for providing and fixing hot water heating apparatus, and the County Council reserved to themselves the right to nominate special tradesmen to execute this work, in which case the fixed sum for the work was to be deducted from the contract price and to be paid direct by the County Council to the tradesman executing the work. By a clause in the contract all specialists, merchants, tradesmen, and others executing any work or supplying any goods for the purposes of the contract who might at any time be nominated or approved by the Council were thereby declared to be sub-contractors employed by the contractor. By a clause in the specification "the contractor is to afford facilities to any other tradesman employed by the Council in the building, and to include the reasonable use of any scaffolding already erected for his own purposes, so that their work may proceed during the progress of his contract."

The County Council, under the option reserved to them, contracted with a firm of hot water engineers to provide and fix the hot water heating apparatus in the building. The defendants, in order to provide a gangway for their workmen over an opening in

an upper floor of the building, laid down two planks side by side across the opening. The planks were not fastened down in any way. The plaintiff, a workman in the employment of the hot water engineers, in the course of his work was passing over the gangway when, apparently by reason of the boards slipping, he fell down the opening and was injured. In an action against the defendants to recover damages for the injuries caused, as alleged, by their negligence:—

*Held*, that the plaintiff was in the position of a person invited by the defendants to use the gangway for the purposes of his work, and that the duty of the defendants to the plaintiff was that of invitors and not that of mere licensors.

APPEAL by the plaintiff from the judgment of Lush J. on further consideration after the trial of the action with a jury.

The action was brought to recover damages for personal injuries sustained by the plaintiff owing to the alleged negligence of the defendants. The defendants, who were builders, entered into a contract with the London County Council, who were the owners of the Bonner Street School at Bethnal Green, to execute the work of remodelling and enlarging the school building according to the specification in the schedule thereto for the lump sum of 11,425*l*.

By clause 12 of the contract the defendants (who were therein referred to as "the contractor") were to provide all materials, plant, labour, matters, and things of every description which might be required for properly executing the contract.

By clause 15, "The Council expressly reserves to itself the right to occupy for its own purposes at any time and for so long a time as the architect" (the superintending architect of the London County Council) "may, by notice in writing to the contractor, require, any portion or portions of the site of the works, whether the work is in progress or not, and to employ thereon agents and workmen in the execution of matters not the subject of this contract, and the contractor shall not obstruct such agents and workmen, and shall allow and provide them unmolested access thereto, and such facilities as, in the judgment of the architect, may by him be reasonably demanded, but without extra charge and without relief from any liabilities or responsibilities incurred by the contractor under this contract."

By clause 31, "All specialists, merchants, tradesmen, and others executing any work or supplying any goods for the purposes of this

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contract, who may at any time be nominated or approved by the Council or the architect on its behalf, are hereby declared to be sub-contractors employed by the contractor, and no nomination or approval as aforesaid or other act of the Council or the architect shall be deemed in any way to constitute the contractor as agent for the Council with respect to the execution of such work or the supply of such goods as aforesaid."

By clause 32 of the specification in the schedule to the contract, "All stated prices referred to as prime cost or by the letters 'P. C.' shall mean the actual or net value of the work or article in question payable after the trade or other discount (except cash discount) has been deducted . . . ."

By clause 36, "Each trade, including all those trades employed direct by the Council, for which specific sums are mentioned in this specification (except heating engineer and gas engineers, for which sums are provided) to be attended upon, cut away for, and made good after, and perform all work in the nature of jobbing work that may be required.

"The contractor is to afford facilities to any other tradesman employed by the Council in the building, and to include the reasonable use of any scaffolding already erected for his own purposes, so that their work may proceed during the progress of his contract."

By clause 39, "The amounts included in the contract for other tradesmen's work with whom the Council has made arrangements as to price are stated in the separate schedule hereafter. The accounts for them, and any further like works, will be paid direct by the Council, and these sums will be deducted in full at the settlement of the accounts . . . ." There was included in the schedule a prime cost sum for hot water heating apparatus.

For the purposes of their work the defendants had laid two scaffold planks side by side across an opening in an upper floor of the building so as to afford a gangway for workmen to pass over the opening from a classroom doorway to a corridor doorway. These doorways were in walls at right angles to each other, the planks being therefore placed diagonally across the opening, the greatest unsupported length of the outer plank being about six feet, and the shortest unsupported length of the inner plank being about three feet. The planks were not nailed or otherwise fastened

down. The County Council, under the option reserved to them, had contracted with Messrs. Watkin & Son, hot water engineers, to execute the work of supplying and fixing the heating apparatus in the building.

On December 21, 1914, the plaintiff, who was a hot water fitter in the employment of Messrs. Watkin at a weekly wage of 2*l.* 4*s.* or 2*l.* 5*s.*, was crossing the gangway in connection with his work when the planks gave way and he fell down the hole and was severely injured. No one saw the accident, but apparently the planks had slipped from their supports when the plaintiff attempted to pass over them, as they were found at the bottom of the hole with the plaintiff. The gangway had been in use for a considerable time before the accident, and the plaintiff had frequently passed over it in safety.

At the trial two main allegations of negligence were made against the defendants, first, in not having the planks fastened down, and, secondly, in not having a handrail as a protection; and Lush J. in his summing-up directed the attention of the jury to those two matters as constituting the negligence alleged against the defendants. (1) The jury found a verdict for the plaintiff for 2000*l.* damages.

Lush J. on further consideration was of opinion that the duty of the defendants towards the plaintiff was that of licensors and not invitors, and in that view there was no breach of duty on their part towards him, there being admittedly no concealed trap. But, in his opinion, it was not necessary to decide whether the defendants were licensors or invitors, because, assuming that they were invitors, if an invitor warned an invitee of the danger, or if the invitee knew of its existence at the time when he used the premises, there was no liability on the part of the invitor. The absence of a handrail and the fact that the planks were not fastened down were obvious and

(1) The Court of Appeal, as stated in the judgments hereunder, said that the learned judge omitted to draw the attention of the jury to a further question, upon which there was some evidence, and which counsel for the plaintiff stated that he put to the jury in his speech, namely, whether there was negligence on the part of the defendants in the due and regular examination of the gangway and the adjustment of the planks so as to see that their position had not become altered during the user of the gangway.

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were well known to the plaintiff, and he could not recover. He accordingly gave judgment for the defendants. (1) The plaintiff appealed, and the defendants served notice of cross-appeal asking, if necessary, for a new trial on the grounds that the verdict was against the weight of the evidence and that the damages were excessive.

April 14, 17, 18. *Moyses* (*Aubrey Davies* with him), for the plaintiff. The defendants were in the position of invitors towards the plaintiff with regard to the use of this gangway. Under their contract with the County Council the defendants had to afford facilities to any other tradesman employed by the Council, including the reasonable use of any scaffolding already erected for their own purposes, so that his work might proceed during the progress of the contract; and all specialists or tradesmen nominated by the Council to execute certain portions of the work were declared to be sub-contractors employed by the defendants. It is clear that in those circumstances the plaintiff, when using this gangway, was an invitee of the defendants, the plaintiff's employers being in the relation of sub-contractors to the defendants, and consequently the defendants were under a duty to the plaintiff to take reasonable care that the premises were reasonably safe for such a person using them in the ordinary and customary manner and with reasonable care: *Norman* v. *Great Western Ry. Co.* (2); *Indermaur* v. *Dames* (3); *Smith* v. *London and St. Katharine Docks Co.* (4); *Marney* v. *Scott* (5); Beven on Negligence, 3rd ed., vol. 1, p. 452. The defendants' duty was to take care to provide a reasonably safe gangway, which they failed to do. The planks were not fastened in any way, nor was there any handrail to steady a workman crossing over them. The planks were liable to shift by reason of persons constantly passing over them, and they therefore required examination from time to time. There was evidence of negligence in this respect upon which the jury were entitled to act. The plaintiff is therefore entitled to judgment on the verdict of the jury. [*Hayn* v. *Culliford* (6), *Harris* v. *Perry* &

(1) See 32 Times L.R. 71.
(2) [1915] 1 K. B. 584.
(3) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(4) (1868) L. R. 3 C. P. 326.
(5) [1899] 1 Q. B. 986.
(6) (1879) 4 C. P. D. 182.

*Co.* (1), *Earl* v. *Lubbock* (2), and *White* v. *Steadman* (3) were also referred to.]

*McCall, K.C.*, and *Craig Henderson*, for the defendants. The London County Council exercised the option which they had under their contract with the defendants of nominating an independent contractor to execute the work of installing the heating apparatus, and for that purpose they entered into a contract with Messrs. Watkin & Son. In *Hampton* v. *Glamorgan County Council* (4) the builder, who had contracted with the county council to build a school for a lump sum, himself entered into the contract with a third person to execute the work of installing the heating apparatus. In the present case the defendants had not entered into any contract with Messrs. Watkin. The work which Messrs. Watkin had to do was taken out of the defendants' contract, and they were not concerned any longer with it. The defendants by their contract had not undertaken to provide scaffolding for Messrs. Watkin's men; they had only undertaken to allow Messrs. Watkin's workmen to use any scaffolding which they had erected for their own purposes, and which was already in existence. The defendants were bound not to remove the gangway, but they had no further obligation towards the plaintiff. The plaintiff when using the gangway was in the position of a mere licensee with regard to the defendants. He had to take the gangway as he found it, it having been admitted at the trial that there was no concealed trap. In *Heaven* v. *Pender* (5) the plaintiff was held to be in the position of an invitee. Lord Herschell in *O'Neill* v. *Everest* (6) and in *Caledonian Ry. Co.* v. *Mulholland* (7) treated *Heaven* v. *Pender* (5) as a case of an invitee being injured through a concealed danger. In *Earl* v. *Lubbock* (8) Stirling L.J., referring to the proposition enunciated by Cotton L.J. in *Heaven* v. *Pender* (9) and agreed to by Bowen L.J.—that "any one . . . who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable

(1) [1903] 2 K. B. 219.
(2) [1905] 1 K. B. 253.
(3) [1913] 3 K. B. 340.
(4) (1915) 84 L. J. (K.B.) 1506.
(5) (1883) 11 Q. B. D. 503, 515.
(6) (1892) 66 L. T. 396.
(7) [1898] A. C. 216, 226, 227.
(8) [1905] 1 K. B. 253, 258.
(9) 11 Q. B. D. 517.

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for injury caused to others by reason of his negligent act"—said that the plaintiff, to bring his case within that proposition, "must adduce evidence to show that to the knowledge of the defendant the van was in such a condition as to cause danger, not necessarily incident to its use." In the present case there was no evidence that the gangway was not reasonably fit for use. Nor was there any evidence that the defendants knew that the planks had shifted and were in such a condition as to cause danger. The plaintiff's case cannot on the evidence be put higher than that an accident happened which is unexplained. *Miller* v. *Hancock* (1), which may appear to support the plaintiff's case, was explained in *Dobson* v. *Horsley* (2) as being a case of a trap. The plaintiff is therefore not entitled to recover.

[PICKFORD L.J. referred to *Latham* v. *Johnson & Nephew., Ld.* (3)]

*Moyses* in reply.

April 19. SWINFEN EADY L.J. In this case the plaintiff appeals from the judgment of Lush J. and asks for judgment for the sum of 2000*l.* awarded to him by the jury. The defendants resist that application, and contend that the judgment is right, but if they fail upon this they ask for a new trial on the grounds that the verdict is against the weight of the evidence and that the damages are excessive.

The circumstances out of which the accident arose were these: The plaintiff is a hot water fitter in the employment of Messrs. Watkin & Son, who carry on business as hot water engineers, at a weekly wage of 2*l.* 4*s.* or 2*l.* 5*s.* He was working at the Bonner Street School at Bethnal Green. The defendants had entered into a contract with the London County Council to remodel and alter the school for the sum of over 11,000*l.*, subject to the deduction of certain items in respect of which the prime cost only was included in that sum. The position as between the defendants and the County Council was this. The defendants had the general contract for carrying out the work. The providing and fixing of the heating apparatus was included in the contract in this sense, that the defendants included in their tender an agreed sum for that work, and the County Council themselves entered into a contract with

(1) [1893] 2 Q. B. 177. (2) [1915] 1 K. B. 634.
(3) [1913] 1 K. B. 398.

Messrs. Watkin & Son for the execution of that work. Clause 36 of the specification is as follows: [The Lord Justice read the clause.] That was the liability which the defendants came under by reason of their contract with the County Council. The facilities which the contractor (the defendants) was bound to afford to any other tradesman employed by the Council in the building were "to include the reasonable use of any scaffolding already erected for his own purposes." Therefore the price paid to the defendants included not only the putting up of the scaffolding for their own purposes, but also the reasonable use of it by any other tradesman, not included in the defendants' contract, but employed directly by the County Council, so that his work might proceed during the progress of the defendants' contract. The plaintiff, who was employed by Messrs. Watkin & Son in the work of installing the heating apparatus, on the day of the accident was passing over a gangway which had been laid by the defendants across an open space between a corridor and a classroom, and, as he said in his evidence, "I stepped on the board; I don't know any more." What happened obviously was that the boards gave way beneath him and that he was precipitated on to the floor below, where he was found seriously injured, both boards having also fallen down. The plaintiff thereupon brought this action.

Having regard to the position of the parties and the obligation of the defendants under their contract with the County Council to allow the men in the employment of Messrs. Watkin & Son to use the gangway and scaffolding, I am of opinion that the relation of the plaintiff towards the defendants was that of a person who had been invited by them to pass over the gangway. The plaintiff was not in the position of a trespasser, nor was he a mere licensee; he was in the higher position of a person who had been invited to pass over the gangway, the defendants being the invitors and the plaintiff the invitee.

At the trial it was suggested, first, that the two planks forming the gangway ought to have been nailed down or secured in some way so as to prevent them from shifting; and, secondly, that there should have been a handrail or some protection by the side of the planks so that a person might steady himself when going over the planks. The learned judge put those two matters to the jury, and

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asked them whether the plaintiff had proved that the defendants had omitted to take reasonable care in the way in which the planks were laid. Specific questions were not put to the jury, but they returned a general verdict for the plaintiff for 2000*l.* damages. The learned judge on further consideration said that the fact that the planks were not secured and the fact that there was no handrail were obvious to the plaintiff, and that, as the plaintiff knew of the existence of the danger when he used the gangway, the defendants as invitors were not liable, and upon that ground he gave judgment for the defendants. The learned judge, however, omitted to draw the attention of the jury to another question upon which there was some evidence, namely, whether there was negligence on the part of the defendants in the due and regular examination of the gangway and the adjustment of the planks so as to see that their position had not become altered during the user of the gangway. The plaintiff's evidence prima facie is consistent with the boards having become displaced and the overlapping parts having become insufficient for proper support. There was evidence that the boards had become displaced. [The Lord Justice referred to the evidence.] The gangway certainly required adjustment from time to time, and possibly failure in this respect may have caused the accident. The man whose duty it was to examine the gangway does not appear to have been called as a witness.

It seems to me to be impossible to maintain that there was no evidence upon which the jury, properly directed, might have returned a verdict for the plaintiff, having regard to what I have said. On the other hand it is equally clear, having regard to the way in which the case was put to the jury, that the present verdict cannot stand, because the jury may have taken the view that there was negligence on the part of the defendants in not fastening the planks or in not providing a handrail. If they took that view and returned a verdict for the plaintiff on one of those grounds, those were matters, as the learned judge pointed out, which were obviously known to the plaintiff. The jury on the other hand may have taken the view that the planks became displaced owing to persons passing over them, and that the overlap in consequence became so slight that the moment the plaintiff stepped on the planks they gave way and he fell. They may have noticed that the man whose duty it

was to examine the planks and adjust them was not called, and they may have drawn the inference that the planks were not examined on this occasion, and that this was the cause of the accident. Therefore it may be that the jury came to the conclusion that the defendants were not as careful as they ought to have been to see that the boards were properly adjusted day by day so as to be free from danger to persons lawfully using them. The result is that there was evidence upon which the jury could properly have come to a conclusion in favour of the plaintiff, and yet, having regard to the way in which the case was put to them, they may have proceeded wholly upon one or both of the two matters I have first mentioned.

For these reasons I think that the trial was unsatisfactory, and that the verdict cannot stand. At the same time it is impossible to uphold the judgment and to say that there was no evidence upon which the plaintiff might have obtained a verdict. There must therefore be a new trial.

I may add that, though the sum awarded is large, upon that ground alone I should not have seen my way to order a new trial.

PICKFORD L.J. I agree and have nothing to add.

BANKES L.J. I agree. The position of the plaintiff towards the defendants depends upon the contract which the defendants made with the County Council. It is essential to the plaintiff's case that he should bring himself into the position of an invitee, and he can only do that by satisfying the Court that by reason of the contract between the defendants and the County Council the defendants had a common interest with his employers in the completion of the work comprised in the contract, and that therefore he, as a workman employed on the work by Messrs. Watkin, was using the gangway as an invitee of the defendants. In *Hampton* v. *Glamorgan County Council* (1), which has been cited to us, I expressed my opinion as to the construction of the contract in that case. So far as the present contract is concerned, in my opinion the workmen employed on the work by Messrs. Watkin, who were in the position of sub-contractors, were invitees of the defendants. That being so, the plaintiff would

(1) 84 L. J. (K.B.) 1506, 1517.

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Bankes L.J.

be entitled to recover if he satisfied the jury that his injury was the result of his being exposed to a concealed danger, which the defendants knew or ought to have known, and of which he himself had no knowledge or notice. The learned judge confined his attention to two matters, one being that the planks were not nailed down, and the other that there was no side rail—matters which the plaintiff's counsel at the trial insisted upon—and I think that the learned judge was right in holding that with regard to those matters there was no evidence proper to be submitted to the jury, because neither was a concealed danger, the plaintiff being well aware of them. There was, however, another matter which counsel for the plaintiff tells us that he put to the jury, but which apparently was lost sight of. When planks are laid as these were without being fastened, there is necessarily a certain amount of movement caused by persons passing over them, as a result of which there is a certain amount of slipping which reduces the overlap at either one end or the other, and eventually the planks slip away unless they are properly watched. Upon the evidence which the plaintiff gave it seems to me that that is a possible inference of fact accounting for the accident. The point was not submitted by the learned judge to the jury, and therefore it is not possible to say whether the jury acted upon it or upon something which they ought not to have acted upon in arriving at their verdict. In my opinion there must be a new trial.

*New trial ordered.*

Solicitors for plaintiff: *Berry, Tompkins & Co.*
Solicitors for defendants: *Clapham, Fraser, Cook & Co.*

W. F. B.

## JOHNSTON *v.* BRAHAM & CAMPBELL.

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*May* 22.

*Principal and Agent—Untrue Statement negligently made by Agent to Principal—Loss suffered by Principal—Measure of Damages.*

A principal who is induced by the negligence of an agent to enter into an adventure from which loss ensues is entitled to recover from the agent the amount he has actually lost together with compensation for his loss of time. But the principal cannot add to that loss the profits which he might have made if he had had his time or money at his disposal instead of having embarked in the adventure which has miscarried.

Appeal by the defendants from a judgment of the judge of the Westminster County Court.

The action was brought by the plaintiff, an actress, to recover damages for negligence and breach of duty owed by the defendants to the plaintiff as her agents for reward in connection with the making of a contract in writing dated October 19, 1915, between the plaintiff and the Suitu Company, Limited. Under the contract the plaintiff was entitled to 60 per cent. of the gross takings at the Palace Music Hall, Northampton, for the week commencing November 29, 1915, she undertaking to pay the salaries of certain artists amounting to 60*l.* for the week.

The plaintiff alleged (inter alia) that the defendants by their manager verbally represented to her shortly before the date of the contract that the weekly takings of the Palace, Northampton (the music-hall of the Suitu Company, Limited), were not less than 250*l.*, and that she was thereby induced to enter into the contract. She alleged that the representation was, as the defendants ought to have known, untrue. The plaintiff, in performance of the contract, took her company to the Palace, Northampton, and played there for the week commencing on November 29, 1915. The total takings for the week were 68*l.* 11*s.* 7*d.* only, and she incurred 35*l.* 13*s.* expenses of her company. She further claimed 38*l.*, the estimated amount of the profits she ought to have made from performing for the week.

The county court judge found that the defendants stated to the plaintiff that the gross takings of the hall were 250*l.* a week, that

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they made the statement honestly, and that the plaintiff was induced to enter into the contract of October 19, 1915, in consequence of the statement. He also found that the defendants were led to make the statement to the plaintiff by the fact that the Suitu Company had guaranteed a payment to them of 120*l.* for one of their own companies to appear at the hall, but that they ought before they made the statement to the plaintiff to have made further inquiries, when they would have found that there was no foundation for it.

At the trial Mr. Hartley Milburn, a theatrical agent, gave evidence to the effect that before an agent takes an engagement for the artist he ought to make himself thoroughly acquainted with the takings of the place, and that if he had to book an artist he should expect the management to give him an account of all that had been done for the previous two or three months. Further, that if he had the information that the defendants had obtained the guarantee of 120*l.* he should have taken the risk for himself of the weekly takings of the hall being not less than 250*l.*, but for a client he should have made further inquiries.

As to damages the county court judge held that the plaintiff had the right to recover the 35*l.* 13*s.*, her expenses. He also awarded her an extra 20*l.*, and it was not quite clear from his judgment upon what basis he assessed that sum. In one part of his judgment he said: "I think she is entitled to add something in respect of profits which she would have got from the hall if the takings had come to 250*l.* . . . . ; and on the whole I give her judgment for 55*l.* 13*s.* and costs"; while in another part of his judgment he appeared to have awarded her the 20*l.* upon the ground that the loss of time she had suffered was to be estimated and valued at that amount.

The defendants appealed upon the grounds (inter alia) (1.) that there was no evidence of any breach of duty or negligence on the part of the defendants; (2.) that loss of profits was not recoverable in law.

*Compston, K.C.*, *Patrick Hastings*, and *Hugh Beazley*, for the defendants. The finding of the county court judge that the defendants represented that the takings were 250*l.* a week was wrong, but even if it was right, the plaintiff cannot in law recover the loss of profits she thinks she would have made: *Salvesen & Co.* v. *Rederi*

*Aktiebolaget Nordstjernan.* (1) The county court judge misdirected himself. He felt bound to accept the evidence of the witness Milburn as showing the standard of duty required from a theatrical agent. But a witness cannot define the legal duty of an agent. The duty of an agent is to exercise the same degree of diligence as he would with regard to his own affairs. The effect of Milburn's evidence was that he is an exceedingly cautious man. The respondent can only recover as damages the actual loss she has suffered.

*Hawke, K.C.*, and *E. F. Lever*, for the plaintiff. The county court judge awarded 20*l.* in addition to the 35*l.* 13*s.*, and there is nothing to show that he included anything beyond the loss suffered by the plaintiff. *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (1) is distinguishable. In that case there was nothing to show that the respondents did not employ their ship at the ordinary profitable rates. The plaintiff is solely dependent upon the contracts she can obtain. If she is only entitled to recover her actual loss, the result would be that, if the defendants were her sole agents and did nothing, it would be impossible for her to make a living by her profession during that time. In *Cassaboglou* v. *Gibb* (2) the agents could not by any diligence have obtained the opium, and it was therefore held that the measure of damages was only the loss actually sustained by the plaintiff, as any further loss resulting from the difference between the value of the opium ordered and that shipped did not flow from the breach. In the present case the loss to the plaintiff naturally resulting from the breach was not only what she had to pay but what she would have gained : *Bell* v. *Cunningham.* (3) She employed the defendants to find her a place where she could profitably employ her time, but they only found her one where she could not profitably employ it, and she is entitled to recover the value of the chance of making a profit which she has lost. She only seeks to recover the amount her usual earnings would have come to during the time she was deprived of the chance of making a profit, not the actual profit she would have made from her contract with the Suitu Company, Limited, if the representation had been true.

(1) [1905] A. C. 302, 311. (2) (1883) 11 Q. B. D. 797.
(3) (1830) 3 Peters, 69, 85.

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*Beazley* in reply. There was no evidence in support of the respondent's claim for the damages she suffered by reason of her loss of time.

ROWLATT J. In this case the first point taken upon behalf of the defendants was that there was no evidence to support the finding of negligence. [The learned judge, having stated the facts, continued :] The principle of law applicable to cases of this kind is clear : the difficulty is in the application of it. The duty of the agent is to exercise reasonable care under the circumstances and to take such steps as reasonable care dictates to him ; but in every case it is a question of fact what particular steps the actual situation called for. That question of fact must be answered bearing in mind and being guided by the principle of law. In this case the evidence of the former agent of the plaintiff appears to me to support the finding of the county court judge as to the duty of the defendants. He said : " I should assume on a guarantee of 120*l.* it would show at least 250*l.* takings. I should make further inquiries for a client, although I would take the risk for myself." On behalf of the defendants it was contended that that evidence merely meant that an ordinary prudent man dealing with his own affairs would take the risk for himself, and that it would have been an excess of caution if the defendants had made further inquiries. I think that it was quite open to the county court judge to take the view that the meaning of that evidence was that a professional man in acting for a client would make the further inquiries, because it would be proper and prudent to do so, although the particular agent giving the evidence was not so careful about his own affairs and therefore would have taken the risk. Therefore that point fails.

An interesting and important point has been raised with regard to the measure of damages. It appears that the plaintiff incurred actual expenses by reason of taking up this engagement into which she was led by the negligence of the defendants to the extent of 35*l.* 13*s.* Those expenses the county court judge awarded her, and it is not disputed by the defendants that if negligence was established the plaintiff has the right to recover those expenses. But the county court judge gave her a further 20*l.*, and the question is what that 20*l.* represents. When a person complains of being

misled by the negligence of an agent into entering into an adventure from which loss ensues he is entitled to recover that loss because it is the amount he has actually less in his pocket, and he is entitled at least to be restored to the position in which he would have been if the agent had not been guilty of the breach of duty towards him. That proposition is not disputed in the present case. But he cannot add to that loss the speculative profits which he might have made if he had had his time or money at his disposal instead of having embarked in the adventure which has miscarried. If a person is induced by fraud or is misled by the negligence of his agent into investing 100*l.* in a business, and in consequence of the failure of the business he only obtains from it 50*l.*, he has clearly lost 50*l.* and is entitled to recover that sum from the agent, but he cannot go on and say "If I had had the 100*l.* I should have employed it in a very lucrative adventure and should have turned it into 150*l.*, and therefore I am entitled to a further 50*l.*" He could only be entitled to that further 50*l.* upon the assumption that in fact he would have made that fortunate speculation, as to which the chain of proof is lacking. The most he would be entitled to add would be the value of the money—which is not a matter of speculation—i.e., the interest on the money or something representing it, which is in the nature of an accretion to the money itself during the time he lost the use of it. In the present case it is not quite clear what the county court judge has done. If he gave the plaintiff the 20*l.* because that is what she would have made if the takings of the hall had been as represented by the defendants, I do not think she would be entitled to it. The breach of duty was that of not exercising reasonable care. The consequence of that breach of duty was that the plaintiff was led into employing her time, talent, and money in a manner she would not have done if there had been care on the part of the defendants. The damage she has suffered is not the profit she would have made if the representation had been true, but the loss she would have avoided if she had been carefully warned and kept from embarking in this undertaking. But the county court judge may have awarded her the 20*l.* not calculating the profits of a venture she might have entered into, nor speculating as to what she would have made in fact if she had not entered into this contract, but because besides losing the money which she had to pay out of

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pocket she lost her time, just as a shipowner sending his ship to load a cargo at a port where he had been negligently told by his agent there was a cargo waiting for him would lose his ship's time if it turned out that there was no cargo there. He may therefore have awarded her the 20*l.* because that was broadly the value of her time taking it on an average.

The plaintiff's position is analogous to that of a workman, or professional man, or any person who earns his living by labour. If he meets with an accident caused by negligence and sues for damages he recovers what he would have made during the time he was laid up, not because at the time it is ascertained in point of fact that he would have made that sum, but because that time which was of value to him he has lost by negligence. In my judgment, if the county court judge took that view his judgment can be supported, but as the matter is of importance I proceed to consider the authorities which have been cited, although, speaking for myself, I do not think that any of them is directly in point.

The first case in point of time was *Bell* v. *Cunningham* (1), in the Supreme Court of the United States. Marshall C.J. was a member of the Court, which was of course of high authority. The facts were that a principal had employed an agent to expend his money at a certain place in buying a certain article, and the agent negligently did not so employ the money. If he had so employed it the value of the article, which was ascertained, would have been a certain sum, and the jury were held entitled to take that value into consideration in assessing the damages. The agent could have obtained the article, but he did not; if he had obtained it, the principal would have had its value in his pocket, and in my view that value was direct proof of the damages he had suffered without the intervention of any speculation. The principal did not recover more than actually would have been in his hands if his instructions had been complied with. That is not a decision that loss of profits can be recovered where a speculation as to what would at re been their amount intervenes as a link in the chain of causation.

The next case was *Cassaboglou* v. *Gibb* (2), and it is necessary to pay close attention to the facts. The defendants were employed as agents to buy certain goods, but as it was impossible to obtain

(1) 3 Peters, 69, 85. (2) 11 Q. B. D. 797

them, the agents were not guilty of any negligence in not buying them. They, however, negligently said they had bought them, and that statement led to loss because the principal resold them and had to pay damages. It was held that the principal could not recover damages calculated upon the value the goods would have been if they had been bought, because ex concessis even the most diligent agent could not have bought them, and in the face of that difficulty the plaintiff was driven to contend that the agent was in the position of a vendor—as an agent no doubt is for the purpose of delivery and for some other purposes—and the decision and the greater part of the judgment ultimately turned upon the rejection of that argument as unsound. It was held that the rule as to damages for breach of a contract for the sale of goods was not applicable, and that the true measure of damages for the negligence of the agent did not include the loss claimed by the plaintiff. I do not think that that case has much bearing upon the present one.

There is also *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (1), where a claim was founded upon an allegation that a ship had not obtained employment. But the ship was not idle, she was in fact employed, and it was therefore held that there was no loss in consequence of the idleness of the ship. As there was no evidence that there had been any better employment open to the ship which had been left unavailable by reason of the negligence of the defendants, Lord Davey held that damages could not be recovered under that head. That case again does not throw light on the present one, because the point we have to deal with did not arise, inasmuch as the ship was not unemployed. If in the present case the plaintiff could have proved that she had refused other employment by reason of the negligence of the defendants, I have no doubt she could have recovered damages upon that ground.

There is also *Chaplin* v. *Hicks* (2), which turned on an entirely different question. There the defendant had contracted, in substance, to give the plaintiff a certain advertisement, and, the defendant having committed a breach of that contract, the question was how much the advertisement was worth to the plaintiff. Ex necessitate the subject-matter of the contract being a chance, that chance had to be estimated in money. There was no question

(1) [1905] A. C. 311. (2) [1911] 2 K. B. 786.

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whether a chance could be relied upon as a link in the chain of causation coupling the damages with the breach—the chance itself was the subject-matter of sale. It was therefore necessary to value the chance, and the verdict of the jury was not disturbed. In the present case, if we came to the conclusion that the county court judge gave as damages what he thought was the value which would be attached to this employment if the representations had been true, that would have been wrong, because those damages would not flow from the negligence. If the plaintiff had known that the representations were untrue, she would not have taken the bargain and could not have earned any profits. Nor do we think we could support his judgment if the 20*l.* was arrived at upon the ground that if the plaintiff had not occupied herself in this engagement during the week she would have gone to another place and have earned specific profits, because speculation would have intervened as to whether that could have been done. But we think the judgment ought to be supported, because it is possible that the county court judge (although he, quite properly, also considered it from another point of view) may have held that as the plaintiff lost a week's time she was entitled to the value of that time just as a workman earning a weekly wage would be entitled to something for loss of time. The sum of 20*l.* does not seem to be unreasonable, and if in order to obtain a more scientific direction of himself by the learned county court judge we sent it back for a new trial it could only make the difference of a few pounds, and even if he took a view favourable to the defendants, it would very likely result in his giving the same sum over again.

In my judgment, therefore, the proper course is to dismiss this appeal.

SANKEY J. I agree. [Having stated the facts the learned judge continued :] Upon behalf of the defendants it was contended that the only duty upon them was to do what a theatrical agent of ordinary diligence would do under the circumstances, and that we ought to infer from the evidence of Mr. Milburn that an agent of ordinary diligence on being told that there was a guarantee of 120*l.* would be justified in taking the risk upon himself of estimating the gross takings at 250*l.* a week if he was inquiring for himself, and

therefore of informing the plaintiff that 250*l.* was the gross takings if he had been making inquiries on her behalf. I think that is to give the go-by to that part of the evidence of Mr. Milburn where he says "I should make further inquiries for a client." That passage shows that Mr. Milburn was setting up as the standard of duty for a theatrical agent in the case of a client the obligation to make further inquiries than the defendants actually did make. In my judgment there is evidence upon which the learned judge could come to the conclusion at which he arrived. That concludes the first point.

With regard to the second point, namely, that the learned county court judge adopted a wrong measure of damages in awarding the 20*l.*, I think that where a principal employs an agent to make an agreement for him, and the principal is able to prove a breach of contract by the agent in making that agreement, the true measure is the principal's actual loss, not his anticipated profit. It seems to me that the question we have to decide is, was there an actual loss sustained by the plaintiff? In order to answer this question I rely upon the passage in Lord Davey's judgment in *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (1) where he says: "I am of opinion that the proper measure of damages in the present case is the same as in the case I have referred to." The case he referred to was *Cassaboglou* v. *Gibb* (2), where it was determined that the measure of damages was the loss actually sustained by the principal in consequence of a misrepresentation, and that it did not include the anticipated profit which he might have made if the representation had been true. Lord Davey added that "there is no evidence that the respondents lost any opportunity of profitably employing their ship."

It appears to me that in this case there was evidence from which the learned county court judge could find that there had been an actual loss sustained by the plaintiff by reason of the fact that she lost the opportunity of profitably employing her time during the week she was performing at the music-hall at Northampton. It is quite true that in one part of his judgment he appears to assess the damages upon the basis of what she would have made if the takings had been 250*l.* as alleged. That, I think, would have been an error.

(1) [1905] A. C. 311. (2) 11 Q. B. D. 797.

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But I think the county court judge in another part of his judgment clearly shows that what he had in his mind and what he really decided was that the loss of time was to be estimated and valued at the sum of 20*l.* or thereabouts, and I think there was evidence on which he could come to that conclusion. Under the circumstances I agree that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiff: *Roberts, Seyd & Co.*
Solicitors for defendants: *Wingfield, Blew & Kenward.*

J. E. A.

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*May* 26, 30.

[IN THE COURT OF APPEAL.]

## FANSHAW AND ANOTHER (TRADING AS ADAMS & CO.) *v.* KNOWLES.

[1915 A. 664.]

*Practice—Trial by Jury—Civil Cases—Separation of Jury after Summing-up—Validity of Verdict—Privy Verdict.*

The rule that any separation of the jury after the judge's summing-up in a criminal case invalidates their verdict does not apply to civil cases. In a civil action a jury stated to the associate, after the judge had left the Court one evening, that they had agreed to a verdict on two points, but could not agree on the third, and then separated for the night. Coming before the judge the next morning they gave a verdict on all three points. To this verdict they attempted to attach a condition, but the judge directed them that they could not do so, and they then withdrew the condition :—

*Held*, that the verdict was valid.

The history of the law as to separation of juries considered.

APPEAL of defendant for judgment or new trial of an action tried before Darling J. and a special jury.

The following statement of facts is taken from the judgment of the Lord Chief Justice :—

In this case the plaintiffs brought an action for damages for breach of three contracts. There were separate defences to two of the contracts, and there was one defence which was common to all, namely, that by the conduct of the plaintiffs the defendant was

entitled to refuse to perform the contract, by reason of non-payment of amounts due by the plaintiffs to the defendant which amounted to a repudiation before breach. The learned judge summed up to the jury and left to them questions with regard to each of the contracts. The jury retired to consider their verdict in the evening and eventually returned into Court with the statement that they were agreed as to the first and second questions, which meant as to the first and second contracts, but were not agreed as to the third. They were then told by the associate to attend the next morning, when the judge would be present, in case the learned judge wished to put further questions to them. On the next morning when the jury returned they said that they found a verdict for the plaintiffs on the first and second contracts and assessed the damages on the first contract at 52*l.* 7*s.* 11*d.* On the second contract they were not agreed as to giving any damages or considering the damages unless they could also consider the third contract, and added that, if their verdict was not accepted on the third contract, they withdrew it on the second. The meaning of that observation was that on their return in the morning objection was taken by the defendant that they could not give a verdict as they had separated overnight. The learned judge then told them that they must give their verdict and in substance that they could not attach the condition which they sought to impose. Then they said that they found for the plaintiffs on the second contract without damages, and had agreed on their verdict on the third contract for the plaintiffs for 1000*l.* damages. Thereupon the learned judge thought the best course was to take the verdict and enter judgment and leave the parties to move this Court. Judgment was then entered, and the recital of the findings of the jury, but the judgment was only in respect of the first and the third contract. Thereupon judgment was entered for 1052*l.* 7*s.* 11*d.*

The defendant appealed.

*F. A. Greer, K.C.*, and *T. Edwards Forster*, for the appellant. It is submitted that the verdict cannot stand. After the judge had summed up and charged the jury he left the Court. The jury then deliberated in private, and after some time came into Court and stated that they were agreed on the first and second points, but not

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on the third point. They separated and were at large for one night, and had the opportunity of discussing the case with other persons. The next morning they were agreed on their verdict, and it was obviously a compromise verdict. The appellant's counsel objected the next morning to any verdict whatever, but the judge took it. In criminal cases the rule is strict that the jury must deliberate together and in private without separating: *Rex* v. *Ketteridge*. (1) It is submitted that there is no distinction between criminal and civil cases. In *Rex* v. *Willmont* (2) the clerk of assize went to the jury and asked them if they were agreed, and answered some questions they put to him, and the verdict was set aside. In *Goby* v. *Wetherill* (3) a verdict in a county court was set aside by a Divisional Court. That decision is not binding on this Court, but it is based, we submit, on a right principle. *Rex* v. *Kinnear* (4) may be cited against us, but there the jury separated before the summing up of the judge. The rules as to juries are stated in Bro. Abr., pl. 17 and 19; Bac. Abr. Juries, p. 768; Co. Litt. 227b; Hale's Pleas of the Crown, 2, 297.

The Juries Act, 1870 (33 & 34 Vict. c. 77), s. 23, granted some relaxation of the strict rules as to keeping juries without food or fire; and the Juries Detention Act, 1897 (60 & 61 Vict. c. 18), s. 1, gives the judge a discretion to allow the jury to separate in some cases of felony, but only "before the jury consider their verdict" That limitation shows that the rule is still strict after they have once retired for that purpose.

*Waugh*, *K.C.*, and *G. W. Powers*, for the respondents. There has always been a marked difference between the treatment of juries in civil cases and in criminal cases. All the authorities cited for the appellant were criminal cases except *Rex* v. *Kinnear* (4), and that is a distinct authority that the separation of the jury before verdict is not in itself enough to make a verdict invalid.

In Co. Litt. 227b, &c., it is stated that in cases between parties, if the jury agree upon a verdict after the judge has left the Court, they may give a privy verdict, either before him or any other judge,

(1) [1915] 1 K. B. 467.

(2) (1914) 10 Cr. App. R. 173; 30 Times L. R. 499.

(3) [1915] 2 K. B. 674.

(4) (1819) 2 B. & Al. 462; also reported 1 Chitty, 401, sub nom. *Rex* v. *Woolf*, where there is a long note on the subject.

and may then separate and afterwards give a public verdict in open Court, which must be before the judge who tried the case, but upon giving the public verdict they may alter their privy verdict. The practice is stated in the same way in Blackstone, iii. 375.

In *Lord Fitzwater's Case* (1) the jury had given a privy verdict overnight and altered it in the morning without having had any opportunity of discussing it. The Court held the verdict bad because they had not discussed it. If the argument of the appellant is correct, the jury were incapable of discussing anything, and the Court would not have given their not having further discussed the verdict as a reason for its being bad. If they had met together it would have been good.

*Lord St. John* v. *Abbot* (2) is a clear authority that the fact that the jury had separated may be a misdemeanour, for which the jury might be punished or fined, but could not invalidate the verdict. The true rule is that the judge had always a discretion in civil cases to allow the jury to separate, and the Court will not assume that the jury have been approached or influenced by reason of the separation, unless there was some evidence of such interference, or the judge considered the verdict against the weight of evidence. Even in the time of Elizabeth a custom had arisen of allowing the jury after they had given a privy verdict to eat, drink, and lie together: *Saunders* v. *Freeman* (3); and the custom has steadily grown less oppressive. But all through there has been a marked distinction between juries in civil cases and in criminal cases. Their origin was different; the civil jury grew out of the Great Assize of Henry II.; petty juries for criminal cases were established by legislation in the time of Edward I. Before that time persons accused of crime were presented by the grand jury, but were tried by ordeal. In early times all crimes were felonies. Misdemeanours were first recognized in the time of Edward II. Greater strictness was naturally required in criminal cases both because the jury were dealing with life and liberty and there was no appeal, and because there was a constant dread of the juries being tampered with by the Crown. Therefore if in a criminal case there was any opportunity of the jury being tampered with the whole

(1) (1675) 1 Freem. K. B. 414, 415.

(2) (1735) Barnes, 441.

(3) (1561) 1 Plowd. 209, 211.

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proceedings were held to be void and the verdict was set aside without any evidence that interference had actually taken place. But in civil cases the Court will assume that all was done properly, unless there is evidence of irregularity or misconduct affecting the verdict. Even proof of misconduct on the part of a juror will not necessarily affect the verdict unless it were instigated by one of the parties or otherwise affected the verdict: *Sabey* v. *Stephens*. (1)

*T. Edwards Forster* in reply.

LORD READING C.J. (after stating the facts as above). The defendant appeals to this Court on two grounds—first, that the verdict is no verdict and is voided by the separation of the jury overnight; and, secondly, that the verdict upon the third contract was a compromise verdict and could not be allowed to stand, and that in substance there was no verdict as to the second contract.

Now the first point is one of importance and involves the proposition put forward by the defendant that no verdict can stand in a civil trial when the jury have been allowed to separate after the learned judge has summed up and the jury have been given in charge of the officer of the Court to consider their verdict. In support of this proposition there is only one case of trial of a civil action which was cited to us—*Goby* v. *Wetherill*. (2) The decision of the Divisional Court in that case was that the presence of a stranger in the room with the jury for a substantial time whilst the jury were deliberating upon and considering their verdict is in itself sufficient to invalidate the verdict. The Court came to the conclusion in that case that they would not inquire, and ought not to inquire, as to what had happened. They thought it was sufficient to invalidate the verdict that there had been a stranger present during the deliberations of the jury which must take place in private, and therefore they set it aside. But that case does not really touch the proposition which has been discussed before us. There the question was not one of separation of the jury, but of the presence of a stranger in the room with the jury; and no case has been cited to us which supports the proposition of the defendant in this appeal. With regard to the separation of juries in criminal

(1) (1862) 7 L. T. 274. (2) [1915] 2 K. B. 674.

trials, the most recent case is *Rex* v. *Ketteridge*. (1) In the words of Lush J., delivering the judgment of the Court of Criminal Appeal (2), "If a juror, after the judge has summed up, in any criminal trial separates himself from his colleagues and, not being under the control of the Court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the Court, renders the whole proceedings abortive, and the only course open to the Court is to discharge the jury and commence the proceedings afresh." Moreover the Court did not think it relevant to consider what had actually taken place, nor whether the irregularity had in fact prejudiced the prisoner. Other cases to a similar effect were cited which are all collected in *Rex* v. *Ketteridge*. (1) That decision laid down the rule applicable in a criminal trial. It did not purport to decide that the same rule would apply in the case of a civil trial. The question this Court has now to consider is whether the reasoning in those cases and the decisions cited, including *Rex* v. *Ketteridge* (1), should apply where the jury separates after the summing-up of the judge and the jury have retired to consider their verdict; and whether the fact of their separation and return the next morning to the Court to give a verdict renders that verdict invalid.

We have had the advantage of an interesting and learned argument upon the subject. The defendant has urged that the same rule must apply in a civil trial. On the other hand it has been argued for the plaintiffs that the old rule of law which would prevent the separation of the jury before they give their verdict after they have retired to consider it is one that no longer applies to civil trials; that the rigidity of the old rule has been relaxed in civil trials, just as it has been relaxed even in criminal trials partly by custom, and recently by the Juries Detention Act, 1897. In Coke upon Littleton, 227b, it is stated that "By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. After they be agreed they may in causes between party and party give a verdict, and if the Court be risen, give a privy

(1) [1915] 1 K. B. 467. (2) [1915] 1 K. B. 470.

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verdict before any of the judges of the Court, and then they may eat and drinke, and the next morning in open Court they may either affirme or alter their privy verdict, and that which is given in Court shall stand. But in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in Court." It is clear, therefore, that at the time of this work being written there was a distinction to be drawn between civil and criminal cases. In the one case, that is in the civil trial, a privy verdict could be given, and then the jury were allowed to eat and drink, and they could either confirm or alter that verdict, that is that privy verdict, when the verdict was given as a public verdict. In Blackstone's Commentaries, iii. 377, it is stated, dealing with verdicts between party and party, that "A verdict is either privy or public. A privy verdict is when the judge hath left or adjourned the Court: and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of Court: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in Court; wherein the jury may, if they please, vary from their privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged." It appears, therefore, that the jury when they had once agreed could return an informal verdict called a privy verdict, and that when they had done that they were entitled to eat and drink, as is said in Coke upon Littleton, which was already a relaxation of the rigidity of the old rule; and in Blackstone's time he says that when they were agreed they gave their privy verdict in order to be delivered from their confinement. It seems, therefore, not only were they allowed to eat and drink if they had given their privy verdict, but in Blackstone's time they were no longer confined, and they could on the next morning, when they gave their public verdict, alter the privy verdict or affirm it as they pleased. Now that shows that when Blackstone's Commentaries were written it was clear that in civil trials juries were allowed to give a verdict after they had separated. The progress in the liberty afforded to juries is shown by the allowance of the release from confinement, which is stated in Blackstone, but not in Coke upon Littleton; and even in Coke

upon Littleton a reference to the case of *Saunders* v. *Freeman* (1) shows that after there had been a privy verdict the jury were then allowed to eat and drink and lie together. It appears to have been by custom that juries were allowed to do this. The words are "and then the same juries for their ease as is the custom to eat and drink together for them aforesaid and to lie together until the morrow aforesaid and then to give their verdict aforesaid openly before the aforesaid justices at Northampton." So that going back to the time of Queen Elizabeth there had already existed some relaxation which is shown by the custom mentioned in Plowden and extended gradually till we get to the date of Blackstone's Commentaries.

In Bacon's Abridgement there is to be found a very useful passage upon this subject. (2) Reference is made to two cases, one of which is *Lord St. John* v. *Abbot.* (3) There the jury withdrew to consider their verdict after receiving the charge. They came into Court before the learned judge had risen and asked a question, received the answer, and again withdrew. Later on on the same day in the afternoon the judge was informed that two or three of the jurors were in Court, evidently having separated from the rest. They were asked by the judge what they did there, and they answered that they and their fellows could not agree on a verdict. They were ordered to go to their fellows. A verdict was afterwards given for the plaintiff, and the judge did not report that it was contrary to the evidence. Then it was sought to set aside the verdict, but the Court held it to be good. The Court thought some of the jurors had been guilty of a great misbehaviour and were liable to be fined, but they thought the plaintiff had not been guilty of any misbehaviour and that the verdict ought to stand. Now in that case it is to be noted there had been a separation of the jurors after the charge had been received, after they had retired to consider their verdict and before they had returned their verdict; nevertheless the Court held that the verdict stood. But the learned judge who tried the case did not report that the verdict was contrary to the evidence, a factor which must always be borne in mind when considering these questions. Later, in *Lord Fitzwater's*

(1) 1 Plowd. 211. (2) 7th ed., vol. 8, p. 107.
(3) Barnes, 441.

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*Case* (1), the jury were divided in opinion. They threw dice for whom they should find a privy verdict, and they accordingly found their privy verdict for the party in whose favour the dice came. Without conferring afterwards together they gave a verdict for the same party in open Court. Their verdict was set aside. The Court said (2): "As our estates, liberties, and lives are in the power of jurors, they ought to be very circumspect in their conduct. In this case the jurors have behaved very improperly, for they were determined by chance in the finding of their privy verdict; and they had not any conference together afterwards, before they gave their verdict in open Court." There again it is to be observed that the Court thought that the verdict should be set aside, as the jurors had not had any conference together after they had returned the privy verdict arrived at only by the casting of dice. It does not follow, and I do not think that it must be understood, that if they had afterwards conferred together the Court would have held the verdict good. It was sufficient for the Court to say they had thrown dice for the privy verdict, and had afterwards without conference found their public verdict in accordance with the privy verdict. But if the law was as contended by the defendant, that the jury could not separate, why should the Court have laid stress upon the absence of conference by the jury before they returned their public verdict? On the whole, consideration of these authorities indicates that this old rule had by custom gradually been relaxed until jurors were allowed to separate before giving their verdict in civil cases. *Rex* v. *Kinnear* (3) was pressed very much upon us. That was a case upon the trial of an indictment for misdemeanour. There the jury had separated at night without the knowledge or consent of the defendants. It was held in that case that the verdict was not thereby invalidated, and the Court refused to grant a new trial, it not appearing that there was any suspicion of any improper communication having taken place. I refer to that case only as showing that even in criminal trials there had already, as is now well known, grown up a practice of allowing juries to separate in trials for misdemeanour during the hearing, which was not permitted in cases of felony. The only observation

(1) 1 Freem. K. B. 414, 415. p. 107.
(2) Bac. Abr., 7th ed., vol. 8,
(3) 2 B. & Al. 462.

I wish to make upon it is that although it shows some relaxation, it must not be assumed that in anything I am stating here to-day I intend to depart from the rule applicable to criminal trials. There are reasons why that rule should be more rigidly enforced in criminal trials. It is sufficient to say that we have not to consider that to-day, and, so far as I am able to judge, there is no reason for departing in any way from the decision of the Court of Criminal Appeal in the case of *Rex* v. *Ketteridge* (1) to which I have already adverted. The conclusion to which I have come upon this point is that in civil trials the separation of the jury does not invalidate the verdict. I think that it is a practice which should be resorted to only in rare instances and where special circumstances demand it. The danger of allowing the separation is pointed out by Blackstone. It is a danger which none the less exists in the present day. There are, of course, circumstances which make it necessary or desirable that the jury should return on the next day for the purpose of hearing a further direction from the judge, or perhaps of settling some point of controversy between the jury as to the evidence, or perhaps for some explanation of the summing-up of the learned judge which some of the jury may not properly have appreciated. The practice in modern times has been, within the knowledge of all who practise in these Courts, to allow a verdict to stand which is given after the consideration of the jury in such a case as the present. It does not happen often, and no doubt for the reason which I have pointed out it is thought undesirable by the judges that it should happen; nevertheless it may happen, and when it does, unless there is something more in the case and in the circumstances of the finding of the verdict than the mere fact of the separation of the jury, the verdict will not be invalidated. In a case in which a judge has come to the conclusion that the verdict was unsatisfactory in his opinion and made a note to that effect, and this Court has then had to consider the verdict of the jury, or where there are other circumstances which throw some suspicion upon the verdict, it is, in my opinion, open to the Court to set aside the verdict. It is a matter for the discretion of the Court. It is not a rule of law that the separation invalidates the verdict. I think the rule is that when there has been a

(1) [1915] 1 K. B. 467

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separation, that is a circumstance which with other circumstances ought to be taken into account and dealt with by the Court. The first point relied upon by the appellant therefore fails.

With regard to the second point, I confess I cannot come to the conclusion that the verdict is wholly satisfactory, but then it is not for me to judge unless there are circumstances which show that as a matter of law this Court is entitled to interfere. It cannot be satisfactory that a jury should hold the conversation which took place when they returned on the next morning, or that they should seek to impose conditions of their returning answers to the questions of the judge, neither could any such condition imposed by them be of any validity or effect. But we must address ourselves, in my view, to the case as presented to us to-day in the notice of appeal, and this verdict is attacked on the second point on the ground that the answer to the third question was in truth a compromise verdict. The notice of motion says that the verdict in respect of the third contract was improper and no real verdict inasmuch as it was made the subject of a condition by the jury, and that in law the verdict could not be given in a conditional alternative manner as aforesaid. I agree with that view, but it does not invalidate the verdict in this case, because the learned judge refused to accept the condition and said the jury must answer without the condition, which they did.

That, I think, disposes of the grounds taken by the defendant in this Court. There is no other ground put forward. This notice of appeal is not based upon any misdirection of the learned judge, nor is it even alleged that the verdict was against the evidence, or that any evidence had been improperly admitted. The sole point taken, apart from the broad proposition on the first point, is that the jury attached a condition to their verdict. Now, looking at it as I think we must having regard to the notice of appeal, I cannot think that that second point avails the defendant in this Court. It cannot be substantiated, because the mere attaching of a condition by a jury is of no effect, and therefore I think that the appeal fails on the second point also. [His Lordship then dealt with the cross-appeal, which claimed some merely formal alterations in the judgment entered, and continued :] In my opinion, therefore, the appeal of the defendant fails and the cross-appeal of the plaintiffs succeeds.

WARRINGTON L.J. I am of the same opinion, and I only wish to add a very few words. The defendant contends that in a civil action the mere fact that the jury are allowed to separate avoids the verdict, that is, if they are allowed to separate after they have received the learned judge's charge and been asked to consider their verdict. Now I think the authorities which have been referred to as to the power of a jury to give a privy verdict are conclusive that that question must be answered against the contention of the defendant. Those authorities seem to me to establish this: first, that on giving such a verdict as that the jury in recent times have been allowed to separate; secondly, that such a verdict was not final, but that when the jurors give their formal verdict they may, at any rate where they have had a further consultation since their separation, either alter or reverse the privy verdict. If that is so, I think it follows necessarily that they may give that which alone is their final verdict after they have separated. In my opinion, therefore, the bare question which is asked here, namely, whether in a civil action after the jury have been charged they can be allowed to separate without avoiding their verdict, must be answered in the affirmative. On the rest of the case I have nothing to add.

SCRUTTON J. There are only three matters on which I wish to add anything to what the Lord Chief Justice has already said. In the first place, what we have said applies only to civil actions, and nothing we have said must be taken to interfere with the strictness with which the jury is dealt with in criminal cases. Secondly, I think that in civil actions the practice of juries separating should be resorted to as seldom as possible for the reason given by Blackstone: "It is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged." I cannot help noting, speaking for myself, that in this case and in the last case before the Court considerable difficulty, if not the whole difficulty, has arisen from the fact that the learned judge who tried the case has not stayed while the jury were deliberating, so that when they have found themselves in difficulty they have not had the judge to advise them. I think myself it is the duty of the judge to stay to assist the jury so long as the jury are deliberating on their verdict, and the fact that in two cases here we have had

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appeals which I think would have been prevented if the judge had stayed supports my own personal feeling on the duty of the judge in these matters. And, thirdly, I do not pretend that the answers given by the jury or the way in which they gave them entirely satisfy me. But the appellant in this case has not complained of any misdirection or absence of direction by the learned judge, and he has not complained of the findings of the jury being against the weight of evidence. We are left, therefore, simply with the point, Does the separation of the jury and the way in which they attempted to answer the questions until stopped by the learned judge afford ground for ordering a new trial? In my opinion the Court should be slow to interfere unless it is satisfied that there is some substantial interference with justice, and when the appellant does not himself allege either any misdirection by the judge or that the finding is against the weight of evidence, I think the Court should be slow to interfere as it is asked in this case.

Solicitors: *Indermaur & Brown, for Horner, Sampson & Wood, Bradford; Rawson & Stevens, for W. E. Price, Leicester.*

J. R. B.

*In re* AN ARBITRATION BETWEEN TONNEVOLD AND FINN FRIIS.

1916
*July* 12.

*Ship—Charterparty—Voyage involving "risk of seizure or capture"—Risk of being attacked and sunk by German Submarines.*

A Norwegian vessel was hired for a term of five years by a charterparty, made in 1912, which provided that "no voyage be undertaken and no documents, goods, or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers or Governments." An arbitrator found as a fact that a particular voyage would involve the risk of the vessel "being attacked and sunk by German submarines":—

*Held*, that a voyage which involved the risk of the vessel being attacked and sunk by German submarines was one which would involve risk of "seizure" or "capture" within the meaning of the charterparty.

AWARD of an arbitrator stated in the form of a special case for the opinion of the Court.

By a charterparty, dated August 5, 1912, the owner, Tonnevold, let the Norwegian ship *Thelma* to Finn Friis for the term of five years, to trade within the limits of the European trade, including the whole Mediterranean and North Africa. The charterparty contained the following clause: "That no voyage be undertaken and no goods, documents, or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers or Governments." In June, 1915, the owner refused to proceed on a voyage from Leith to Rouen, owing to the risk of German submarines and mines; and subsequently for the same reason refused to proceed on a voyage from Liverpool to Trondjheim and thence to Archangel and back to Hull. The arbitrator found that those voyages involved the risk of the vessel "being attacked and sunk by German submarines," and he awarded that on the true construction of the contract and the facts found those voyages involved the "risk of seizure, capture, or penalty by rulers or Governments," and that the owner was therefore not obliged to undertake them. The case for the opinion of the Court was whether the fact that the said voyages involved the risk of being attacked and sunk by German submarines entitled the shipowner to refuse to proceed on those voyages under the above clause in the charterparty.

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TONNEVOLD AND FINN FRIIS, *In re.*

*MacKinnon, K.C.*, and *Stuart Bevan*, for the charterer. The risk of being attacked and sunk by submarines was not a risk of "seizure" or "capture" within the meaning of the clause in the charterparty. Seizure or capture means that possession of the vessel has been taken by rulers or Governments, and it would be straining the meaning of language too far to say that a vessel which has only been attacked and sunk has been seized or captured.

*Leck, K.C.*, and *L. C. Thomas*, for the shipowner, were not called upon to argue.

SCRUTTON J., after reading the clause in the charterparty and stating the facts, proceeded: I doubt whether when this charterparty was entered into the parties had in mind damage from submarines, but I think that it is clear that their intention was that the shipowner should not be bound to undertake any voyage which would expose him to the risk of having his vessel taken out of his possession "by rulers or Governments," and that when they used the words "seizure" and "capture" they were indicating acts of rulers or Governments which would deprive the owner of his vessel. It is contended that mere sinking by a submarine cannot be "seizure" or "capture"; but although the Government owning the submarine does not, I suppose, take possession of the vessel after it has been sunk, yet the effect is the same in depriving the shipowner of the possession of his vessel by the action of the Government owning the submarine. I agree with the arbitrator that it would be putting much too fine and technical a meaning upon the words to hold that where the commander of a submarine went on board a vessel and ordered her crew to leave and then sank her it would be "capture," but that where he did not go or send any one on board, but only ordered the crew to leave and then sank her, it would not be "capture." I think that the arbitrator has taken the right commercial view of the case and I agree with his award.

*Award confirmed.*

Solicitors for charterer: *Thain Davidson & Co.*
Solicitors for shipowner: *Botterell & Roche.*

J. H. W.

## FERGUSON *v.* INLAND REVENUE COMMISSIONERS.

1916
*July* 13.

*Revenue—Undeveloped Land Duty—Brickworks—Erection of Buildings—Land in Reserve for Brick-earth—Land "used bona fide for any business"—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 16.

Land consisting of ninety-three acres was purchased between 1896 and 1899 for the purpose of brickworks. The purchaser erected buildings for that purpose costing 36,000*l.* on a portion of the land consisting of forty-nine acres. The remainder of the land was let on agreements for short terms in three plots as arable land and nursery gardens. The manufacture of bricks was carried on in the buildings and on the first-mentioned portion of the land, but in order to obtain a proper return for the capital expended on the buildings it was found that it would be necessary to continue working the brickyard for thirty years, and, therefore, that the brick-earth in the three plots which were let as arable land and nursery gardens was necessary as a reserve for the successful working of the undertaking:—

*Held*, that the three plots had not been "developed" by the erection of buildings within the meaning of s. 16, sub-s. 2, of the Finance (1909-10) Act, 1910; that they were "not otherwise used bona fide for any business, trade, or industry other than agriculture" within the meaning of the sub-section; and, therefore, that they were subject to assessment to undeveloped land duty.

Principles laid down in *Inland Revenue Commissioners* v. *Devonshire* (*Duke*) [1914] 2 K. B. 627 and in *Brake* v. *Inland Revenue Commissioners* [1915] 1 K. B. 731 applied.

Appeal from the decision of a referee under the Finance (1909-10) Act, 1910.

The appellant, who appealed against an assessment to undeveloped land duty, was the receiver appointed by the mortgagees of one Hills, who purchased, between 1896 and 1899, about ninety-three acres of land in the parish of Enfield for the purpose of establishing brickworks, and who erected buildings for that purpose costing about 36,000*l.* on a part of the land marked No. 6811 on the plan annexed to the case, and consisting of about forty-nine acres in area. The remainder of the land was let on agreements for short terms in three plots, marked respectively on the plan Nos. 12801, 12802, and 6360. Plot 12801 consisted of about 16 a. 1 r. 4 p., and was let as arable land; plot 12802

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consisted of about 3 a. 2 r. 36 p., and plot 6360 consisted of about 23 a. 2 r. 10 p., the two latter plots being let as nursery gardens. The manufacture of bricks was carried on in the buildings and on the land marked No. 6811 until 1911, when Hills failed, and since then money had been spent in gradually improving and renovating the plant and buildings. It was proved before the referee that the brick-earth in about five acres of No. 6811 was still unworked, and would be sufficient for the purpose of carrying on the works for five years, but that in order to obtain a proper return for the capital expended on the buildings it would be necessary to continue working the brickyard for thirty years, and therefore that the brick-earth in plots numbered 12801, 12802, and 6360 was necessary as a reserve of brick-earth for the successful working of the undertaking.

The referee decided that the land marked Nos. 12801, 12802, and 6360 was not developed by the erection of buildings within the meaning of s. 16, sub-s. 2, of the Finance (1909-10) Act, 1910 (1);

(1) Sect. 16, sub-s. 2, of the Finance (1909-10) Act, 1910: "For the purposes of this part of this Act, land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling houses or of buildings for the purposes of any business, trade, or industry other than agriculture (but including glass-houses or greenhouses), or is not otherwise used bona fide for any business, trade, or industry other than agriculture:

"Provided that—

. . . . .

"(*b*) Where the owner of any land included in any scheme of land development shows that he or his predecessors in title have, with a view to the land being developed or used as aforesaid, incurred expenditure on roads . . . . or sewers, that land shall, to the extent of one acre for every complete hundred pounds of that expenditure, for the purposes of this section, be treated as land so developed or used although it is not for the time being actually so developed or used, but, for the purposes of this provision, no expenditure shall be taken into account if ten years have elapsed since the date of the expenditure, or if after the date of the expenditure the land having been developed reverts to the condition of undeveloped land, and in a case where the amount of the expenditure does not cover the whole of the land included in the scheme of land development, the part of the land

that it was not otherwise used bona fide for any business, trade, or industry other than agriculture within the meaning of the sub-section ; and that it was therefore subject to assessment to undeveloped land duty.

*W. Allen*, for the appellant. The sole question is whether this land is liable to assessment to undeveloped land duty. It is found as a fact that the whole of the land, i.e., the ninety-three acres, was acquired for the purpose of establishing brickworks, and that the business could only be carried on successfully as a commercial undertaking if that portion of the land which is now separately let is available for use as a reserve of brick-earth ; in other words, it is found that the business would not have been established unless the whole of the land was available for the purposes of the business. In *Inland Revenue Commissioners* v. *Devonshire* (*Duke*) (1) Scrutton J. said that "the question how much land is developed by the erection of buildings for trade will rarely become practical, as land adjoining trade buildings though not occupied by them is not taxed if used for trade, as it generally will be" ; and he added that in his view the site of a building together with such an amount of adjoining land as is essential to its use is "developed" by the erection of the building. Applying that test to the present case, the whole of this land is essential to the carrying on as a commercial undertaking of the business of the brickworks, and therefore it has been "developed." The erection of the buildings has brought out the latent capabilities of the land. Alternatively, the land is "developed" within the latter words of sub-s. 2 of s. 16 by reason of the fact that it is bona fide used as a reserve of brick-earth for the purposes of the business.

*Sir Frederick Smith, A.-G.*, and *Sheldon*, for the respondents. Sect. 16, sub-s. 2, of the Finance (1909-10) Act, 1910, refers to the condition of the land at the time when the question whether or

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to be treated as land developed or used as aforesaid shall be determined by the Commissioners as being the land with a view to the development or use of which as aforesaid the expenditure has been in the main incurred."

(1) [1914] 2 K. B. 627, 639.

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not it is "developed" comes to be considered. In this case the referee has found that the land has not been developed by the erection of buildings, and is not otherwise used bona fide for any business, trade, or industry other than agriculture; and in so finding he has not misdirected himself. The appellant says that in order to be a commercial success the business will have to be continued for thirty years, and that ultimately the whole of the land will have to be used. The same argument would have to be employed supposing that instead of thirty years one hundred years would be required in order to make the business a commercial success. If it is said that, although one hundred years must elapse before the business can be made a commercial success, the land is at the present time "developed," the absurdity of the contention is manifest; there would be no undeveloped land left. All such cases must be dealt with by the referee in the exercise of his discretion; and in this case the referee has given his decision against the appellant. Moreover, if the appellant's argument is sound, there would have been no need for the special relief given by proviso (*b*) to sub-s. 2 of s. 16. *Inland Revenue Commissioners* v. *Devonshire* (*Duke*) (1) has no analogy to the present case. In that case no question arose as to the future development of the property; the question was whether so much land was, at the time the referee was considering the matter, necessary and proper for the enjoyment of such a house as Devonshire House. [*Brake* v. *Inland Revenue Commissioners* (2) was also referred to.]

*Allen* replied.

ATKIN J., after stating the facts and the referee's findings, continued as follows: No question arises as to the amount of the assessment; the sole question is whether this land is or is not "developed." It is contended that it has been developed by the erection of the buildings at a cost of 36,000*l.* upon the plot of forty-nine acres—plot No. 6811—because, it is said, the owner will not be able to recoup himself the money he has spent upon the works unless he eventually uses the brick-earth underlying the whole of the land. That does not seem to me to come within the meaning of "development" by the erection of buildings. This

(1) [1914] 2 K. B. 627. (2) [1915] 1 K. B. 731.

point was dealt with in *Inland Revenue Commissioners* v. *Devonshire* (*Duke*) (1), where Scrutton J., dealing with the sub-section now in question but speaking, it is true, of the development of land by the erection of a dwelling-house, said this: "The next question is, what extent of land is under s. 16 'developed' by the erection of the dwelling-house? The Commissioners say, 'Only the actual land occupied by the house.' The referee and the respondent say, 'Such other land adjoining as is essential to its enjoyment as a house,' a question of fact in each case. The other part of s. 16 does not give much help here, for the question how much land is developed by the erection of buildings for trade will rarely become practical, as land adjoining trade buildings though not occupied by them is not taxed if used for trade, as it generally will be. The object of the undeveloped land duty appears to be in the case of land worth over 50*l.* an acre, which has a higher value for building or trade purposes than it has for agriculture, to impose a tax on such excess value, one of the purposes of the Legislature, as I gather from the statute, being to force such land into the market for trade or building of houses. This is said to 'develop' the land—meaning, I suppose, to bring out its latent capabilities, one of the meanings of the word 'develop' given in the Oxford Dictionary. What happens if you erect a dwelling-house on land? That it may be an effective dwelling-house some more land than it actually covers is clearly necessary. You cannot build right up to its front or back door, depriving it of access, or up to its windows, depriving it of light and air. A certain space must be allowed between it and other buildings, and you cannot build over its drains; the notion of a dwelling-house on land involves the notion of vacant land round it essential to its effectiveness. And, further, as houses are built to sell or let or live in, I think it involves so much land as would ordinarily be expected to go with a house of that size, if it is to be merchantable or livable, and not in the language of the Act to become 'derelict.' I should express the referee's view 'essential to its enjoyment' as 'essential to its use as a dwelling-house by the class of persons who might, from the business point of view of a person dealing in houses, be expected to live in it'; and I regard the site of the house together

(1) [1914] 2 K. B. 627, 639.

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with such an amount of adjoining land as complies with that definition as 'developed' by the erection of such a house." In my opinion that principle is applicable to the erection of business buildings, and therefore so much land will be included as would ordinarily be expected to go with those buildings so as to make them effective for the purpose for which they were erected. The amount of land which is "developed" being such an amount as is essential to the effectiveness of the buildings, I think it is impossible to say that the land in question in this case is essential to the effectiveness of these buildings as buildings intended as brickworks.

If this land does not come within s. 16, sub-s. 2, of the Act as "developed" by the erection of buildings, I have to consider whether it is undeveloped land on the ground that it is "not otherwise used bona fide for any business, trade, or industry other than agriculture." In fact the land is not used for any business other than agriculture; it is used for agricultural purposes, and the only way in which it can be said to be used for the purposes of this business is because the referee has found that to obtain a proper return for the capital expended on the buildings it would be necessary to continue working the brickyard for thirty years, using the brick-earth on the land in question as a reserve of brick-earth. That does not appear to me to be "using" the land within the true meaning of the sub-section. The opposite view to that now put forward was laid down by Rowlatt J. in *Brake* v. *Inland Revenue Commissioners*. (1) There it was held that a person who in the ordinary course of his business as a land developer owns land which he divides into plots and advertises and sells does not "use" that land "for any business" within s. 16, sub-s. 2, of the Act. Rowlatt J. said that "the use of the land means the use of the land as land, and that brings in the idea of physical use. The use of it meant by the statute is not the use of it as a saleable article held in a condition in which, regarded as land, it is unused for business, trade, or industry, whether it is so held as a marketable commodity, or as a sample, or as serving any other ulterior commercial purpose." In other words, the intention to use land hereafter so as to enable the owner to get a return on the capital expended in buying it is not a "use" of the land within the meaning of the statute. That

(1) [1915] 1 K. B. 731, 733.

view is supported by the language of clause (*b*) of the proviso to sub-s. 2 of s. 16, which indicates that, apart from that proviso, the mere expenditure on land with a view to using the land hereafter in such a way as to recoup the owner cannot be said to be either a development or a user of the land in itself.

In my opinion the referee was right in finding that this land was not developed by the erection of buildings, and that it is "not otherwise used bona fide for any business, trade, or industry other than agriculture." Each case must of course depend upon its own circumstances. It may, however, very well be that where land is held for the purposes of a business, part being in actual use, while as to the remainder there is an immediate contemplation of using it as part of the present business operations, as for example a piece of land to be used as a tipping ground, such land may be said to be used for the business operations, just as the land in contemplation here for immediate use as a brickfield, that is, the plot of land on which the buildings are erected and on which the brick-earth is not yet worked out, may be said to be used in the business of the brickworks. But the land now in question, which is separately let and is not used for the business, not being in my opinion "developed" land, is properly assessable. The appeal therefore fails.

*Appeal dismissed.*

Solicitors for appellant: *Hammond & Richards.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. S. H.

1916
*July* 12.

STEVENS (SURVEYOR OF TAXES) *v.* E. BOUSTEAD & CO.

*Revenue—Income Tax—Deductions—Annual Value of Business Premises situated Abroad—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 9.

The respondents, who carried on business in London and at Singapore and Penang, claimed to deduct as an expense in arriving at the amount of their profits or gains assessable to income tax under Sched. D the annual value of the premises owned and occupied by them at Singapore and Penang for the purposes of their business :—

*Held*, that the annual value of the premises in question was a proper deduction in arriving at the respondents' profits or gains assessable to income tax under Sched. D, and that this was not affected by the fact that the premises being situated abroad were not assessable to income tax under Sched. A.

*Russell* v. *Town and County Bank* (1888) 13 App. Cas. 418 and *Usher's Wiltshire Brewery* v. *Bruce* [1915] A. C. 433 applied.

CASE stated by the Commissioners for General Purposes of the Income Tax Acts for the City of London.

At a meeting of the Commissioners held at the Guildhall on November 12, 1914, the respondents, E. Boustead & Co., of 3, Lloyd's Avenue, appealed against an additional first assessment of 1084*l.* under Sched. D to the Income Tax Act, 1853, made on them by the Commissioners on August 12, 1913, for the financial year 1912 ending April 5, 1913.

At the hearing the following facts were proved or admitted :—

The respondents carried on business at Singapore and Penang and other places in the East and also in the city of London. They claimed to deduct as an expense the annual value of the business premises which they owned and occupied at Singapore and at Penang where part of the profits were made on which the assessment was based.

It was not disputed that the amount of the City rating valuation of the business premises occupied by the respondents in Singapore and Penang was correctly stated at 1084*l.* (1), and the payment of

(1) It was stated in the course of the argument that the annual value of the premises should have been stated at 3254*l.*, but for the purposes of this report the precise figure is immaterial.

the rates and taxes was admitted by the surveyor of taxes as a proper deduction as an expense in the respondents' profit and loss account, and for the purposes of the present case it was not disputed that 1084*l.* was the annual value of the premises. It was not disputed by the surveyor of taxes that if the premises had been occupied at such rental of 1084*l.* in the United Kingdom the amount of such rent would have been allowed as a deduction or expense, but it was contended that as there was no Sched. A duty under the Income Tax Acts referring to foreign companies or imposed in Singapore or Penang, the respondents should not be allowed any deduction in respect of the rental value of the premises they occupied for the purposes of their business.

A partner in the respondents' firm gave evidence that it would have been impossible to have made any profit in their Singapore or Penang business if they had not had premises of the value of the amount charged as a deduction in the profit and loss account; and he claimed, therefore, that the annual value was a preliminary expense essential to the making of any profit chargeable under the Act. He also stated in reference to the deduction that the same was not a deduction from profits, but was a necessary preliminary expense for the making of any profits; that the whole of the premises charged for were built and used solely for the firm's business and were structurally divided from any other premises and were essential for the purpose of earning the profits charged with income tax and for no other purpose.

Counsel for the surveyor of taxes claimed to strike out from the profit and loss account the amount so charged by way of deduction as an expense, and contended that on the construction of the Income Tax Act, 1842, the deduction should not be allowed, as the rules prohibit all deductions except those expressly enumerated in the Act, and that as the deduction was not so enumerated the respondents could not claim the allowance thereof.

It was also claimed that as by s. 9 of the Finance Act, 1898, it is enacted that "Where in estimating the amount of annual profits or gains arising or accruing from any profession, trade . . . . and chargeable to income tax under Schedule D of the Income Tax Act, 1853, any sum is deducted on account of the annual value of the premises used for the purpose of such profession, trade . . . . the

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sum so deducted shall not exceed the amount of the assessment of the premises for the purpose of income tax under Schedule A to the said Act, as reduced for the purpose of collection under section 35 of the Finance Act, 1894," and as it was not disputed that there was no assessment to income tax under Sched. A applicable to or in force at Singapore and Penang where the business was carried on, no claim to any deduction could arise.

Counsel for the respondents contended to the contrary.

The Commissioners found as facts :—

(1.) That the premises were used exclusively for business purposes, and that their annual value was at least the amount claimed as a deduction.

(2.) That the annual value of the premises was an expenditure necessary for earning the receipts for the year in question.

(3.) That the respondents in using the premises put themselves to the expense of their annual value for the purposes of their trade, and that the said annual value was money wholly and exclusively expended for the purposes of their trade.

The Commissioners discharged the assessment, but stated this case for the opinion of the Court.

*Sir George Cave*, *S.-G.*, and *T. H. Parr* (for *Raymond Asquith*, now serving with His Majesty's Forces), for the appellant. It is not disputed that the annual value of premises owned and occupied for business purposes in this country may be deducted in order to arrive at the trader's balance of profits or gains for income tax purposes. That was decided by the House of Lords in *Russell* v. *Town and County Bank* (1) and again recognized in *Usher's Wiltshire Brewery* v. *Bruce* (2), although it has never been determined quite clearly why the deduction is allowed. But whatever was the basis of those decisions, the principle there laid down does not apply to the present case. Premises in this country are taxed under Sched. A of the Income Tax Act, whereas the premises now in question are situated abroad and are not subject to taxation under Sched. A.

[ATKIN J. Lord Herschell in his judgment in *Russell* v. *Town and County Bank* (1) did not give as the reason for allowing the

(1) 13 App. Cas. 418. (2) [1915] A. C. 433.

deduction of the annual value of premises that the premises were already taxed under Sched. A.]

In *General Hydraulic Power Co.* v. *Hancock* (1) Scrutton J. appears to suggest that that is the reason for allowing the deduction, and this contention is borne out by a consideration of s. 9 of the Finance Act, 1898, which, although it recognizes the rule in *Russell* v. *Town and County Bank* (2), shows that the deduction is allowed on the footing that it is because the premises are taxed under Sched. A; see also per Lord Macnaghten in *Colquhoun* v. *Brooks*. (3) Moreover, this deduction ought not to be allowed, inasmuch as the premises in question form part of the respondents' capital. If the capital had remained in the form of money the respondents could not have deducted interest which might have been made if the amount had been laid out at interest: see Sched. D, First Case, rule 3. Further, even if the annual value of the premises can be treated as an expenditure, it should also be treated as a receipt, and the one should be set off against the other.

*Duke, K.C.*, and *D. M. Hogg*, for the respondents. The Court is bound by the decisions in *Russell* v. *Town and County Bank* (2) and *Usher's Wiltshire Brewery* v. *Bruce* (4) to hold that the annual value of business premises can be deducted in arriving at a trader's profits. As was said in *Usher's Case* (4), the profits are to be estimated on ordinary principles of commercial trading. The premises are not, as contended on behalf of the appellant, part of the respondents' capital engaged in their business. Neither the argument suggested on this point nor that based upon the suggestion that the annual value of the premises should be regarded as a receipt as well as an expenditure is reconcilable with the decisions in *Russell's Case* (2) and in *Usher's Case*. (4) As to the contention based on s. 9 of the Finance Act, 1898, there is no ground for saying that that section applies except where there is a deduction under Sched. A; the section is not apt to deal with foreign land which is not taxed under Sched. A. [*Gillatt and Watts* v. *Colquhoun* (5) was also referred to.]

*Sir George Cave, S.-G.*, replied.

(1) [1914] 2 K. B. 21, 28, 29.
(2) 13 App. Cas. 418.
(3) (1889) 14 App. Cas. 493, 515.
(4) [1915] A. C. 433.
(5) (1884) 33 W. R. 258.

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ATKIN J. In this case the respondents were assessed on the profits made by them in their business carried on in this country and at Singapore and Penang. There is no question but that they were rightly assessed in respect of the profits made by them in their business carried on at Singapore and Penang; the sole question for decision is whether in estimating those profits for income tax purposes the annual value of their business premises in Singapore and Penang can be deducted. That question turns upon certain rules in the Income Tax Acts, 1842 and 1853, but the primary matter is the ascertainment of the profits or gains according to ordinary mercantile practice. That was laid down in *Usher's Wiltshire Brewery* v. *Bruce* (1), where Earl Loreburn, referring to the case of *Smith* v. *Lion Brewery Co.* (2), in which he delivered a dissenting judgment, said this: "The reasons given were that profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it, subject to the limitations prescribed by the Act." Another general principle by which I am to be guided is stated by Lord Sumner in *Usher's Case* (3), where, after discussing the Income Tax Act and the rules, he said this: "The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." Unless, therefore, there is some express prohibition in the statutes dealing with deductions, I should have no doubt but that the annual value of the business premises was a proper debit item to be charged against the incomings of the trade, or that, in the words of Earl Loreburn, one would, in estimating the profits and gains of a business "on ordinary principles of commercial trading," set against the incomings the annual value of the business premises.

(1) [1915] A. C. 433, 444. (2) [1911] A. C. 150.
(3) [1915] A. C. 433, 468.

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Atkin J.

But apart from that principle I think I am bound by authority to hold that in estimating the profits of a business for the purposes of income tax the annual value of the business premises is to be deducted. That question arose directly in *Russell* v. *Town and County Bank* (1), where the question was whether the bank, in estimating its profits, was entitled to deduct the annual value of the bank premises in which the business was carried on and in a portion of which the bank manager resided. The House of Lords held that the bank was entitled to make the deduction. In that case Lord Herschell said (2): "Now it is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am, of course, speaking, for the moment, of premises which are not used in any way as a place of dwelling, but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed because it is an essential element to be taken into account in ascertaining the amount of the balance of profits. If not it can only be included by a very broad extension of the terms actually used, as being a disbursement or expense which is money wholly and exclusively laid out or expended for the purposes of the trade." The same principle was again affirmed by the House of Lords in *Usher's Case* (3) and by Scrutton J. in *General Hydraulic Power Co.* v. *Hancock.* (4) It is said, however, that those cases are applicable only to businesses carried on in this country. It is true that they related to businesses carried on in this country, but the terms of Sched. D extend to businesses in this country and elsewhere; no distinction is made in the rules in the Income Tax Acts between a business carried on here and a business carried on abroad, and, indeed, if the principle is to be adopted, as I think it is, that one must ascertain the profits of a business according to ordinary mercantile practice, it is immaterial where it is situated. For that reason it is unnecessary for me to go through the different rules, because, in the cases I have referred to, they have been held not to be inconsistent with the allowance of the annual value of business premises.

(1) 13 App. Cas. 418.
(2) 13 App. Cas. 425.
(3) [1915] A. C. 433.
(4) [1914] 2 K. B. 21.

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I think, further, that this matter is concluded, subject to one possible point, by the second rule of the First and Second Cases laid down in s. 100 of the Income Tax Act, 1842, which provides that "the computation of the duty to be charged in respect of any trade, manufacture, adventure, or concern, or any profession, whether carried on by any person singly or by any one or more persons jointly . . . . shall be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such profession, trade, manufacture, adventure, or concern." That rule would exclude the annual value of these premises because they are occupied for trade. The one possible doubt to which I referred is this: it is said that the rule does not apply at all in the case of a business carried on abroad. For the reasons I have already given it is really unnecessary to rely upon this rule, and therefore what I am saying upon it is obiter; but I can see no reason why the rule should not apply to a business carried on abroad, there being nothing to limit it to a business or profession carried on in this country. If that is so, I think the rule would justify the respondents in estimating their profits in deducting the annual value of their business premises.

It is said by the Solicitor-General that the reason for allowing the deduction of the annual value of business premises in this country is because they are chargeable already under Sched. A, which is confined to land in this country, and that inasmuch as land situated abroad is not chargeable under Sched. A the deduction should not be allowed in this case. As I have pointed out, the reasons given by the House of Lords in *Russell's Case* (1) for allowing the deduction had nothing to do with double taxation or with Sched. A, and I can see no ground for assuming that to be the reason for the decision when none of the Lords suggested it and indeed gave quite different reasons. The reason now suggested by the Solicitor-General cannot be the ground for supporting the assessment.

It was further said by the Solicitor-General that the annual value of the premises was interest on capital, which by rule 3 of the First Case is declared not to be deductible. It is perfectly true that interest on capital cannot be deducted, but on the other hand there

(1) 13 App. Cas. 418.

is rule 2 of the First and Second Cases, and the decision of the House of Lords in *Russell's Case* (1) that the annual value of business premises can be deducted. The objection that it is interest on capital would have been equally applicable in those cases.

The next point was that, assuming that the annual value of the business premises can be treated as an expenditure, it must be treated also as a business receipt. That appears to me to be fallacious. The real view is that it is, as Lord Sumner said in *Usher's Case* (2), a proper debit item to be charged against incomings of the trade; that it is not to be treated as a receipt at all. Further, if the Solicitor-General's argument is good, it is impossible to explain the decision of the House of Lords in *Russell's Case*. (1) The annual value of the premises was not brought in as a receipt in that case, and there is no reason why it should be brought in here.

The only remaining point is under s. 9 of the Finance Act, 1898. That section, I think, assumes that the annual value can be deducted for the purpose of ascertaining the profits of the business; and it by no means follows that because a statute imposes a measure beyond which the estimate may not go it intends to provide that no sum is to be deducted unless that measure of excess can be applied. The right way of reading that section is to say that the sum to be deducted shall not exceed the amount under Sched. A, and that if there is no assessment under that schedule no limit is provided. Another way of putting it is to say, as Mr. Duke said, that the section only applies to a deduction in respect of premises which are assessable under Sched. A, and that it does not apply to the premises dealt with in this case, which cannot be assessed under that schedule. Sect. 9 of the Act of 1898 in no way prevents the proprietor of premises situated abroad and used solely for the purposes of his business from ascertaining his profits in the ordinary commercial way. It was urged upon me that if the respondents' view is correct they are not chargeable in respect of the profits which accrued to them from this land, and therefore that they are in a different position from persons in this country. The answer to that is that the statutes contain provisions under which land situated abroad is taxed; but, whether the respondents can be taxed or not in respect of those premises, I can find nothing to compel me to say

(1) 13 App. Cas. 418. (2) [1915] A. C. 433, 468.

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that this deduction ought not to be made by them, seeing that, in the words of Lord Herschell in *Russell's Case* (1), it is an essential element to be taken into account in order to arrive at the profits or gains of the business. The appeal must be dismissed with costs.

*Appeal dismissed.*

Solicitor for appellant : *Solicitor of Inland Revenue.*
Solicitors for respondents : *Thompsons, Quarrell & Jones.*

J. S. H.

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*May* 5, 6.

[IN THE COURT OF APPEAL.]

## HOOLE URBAN DISTRICT COUNCIL *v.* FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[1915 H. 572.]

*Principal and Surety—Bond for due Performance of Contract—Arbitration Clause in Contract—Reference by Consent outside Clause—Contractor ordered to pay Costs—Liability of Surety.*

Judgment of Bailhache J. [1916] 1 K. B. 25 in favour of the defendants affirmed on the ground of the plaintiffs' departure from the original contract, the Court giving no decision upon the point of law decided by him.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury ; reported [1916] 1 K. B. 25.

By a contract W. H. Owen, therein called the contractor, agreed with the plaintiff council to execute for them certain sewerage works. By clause 12 of the contract, " If any dispute or difference shall arise between the contractor and the council touching or concerning the works or any alterations, additions, or omissions thereto or therefrom, or in any wise relating to this contract, such dispute or difference shall be referred to the said Fred. Davies " (the surveyor to the council), " and his decision thereon shall be final and conclusive." The defendants as sureties gave to the plaintiffs a bond in the sum of 500*l.*, the condition of the bond being that the contractor " shall well and truly perform, fulfil, and keep

(1) 13 App. Cas. 418, 425.

all and every the clauses, terms, conditions, and stipulations in the said recited contract."

Disputes arose between the contractor and the council, and the contractor brought an action against the council claiming that a sum of money was due to him.

The council applied under s. 4 of the Arbitration Act, 1889, to stay the action, intimating that they had a counter-claim against the contractor, and upon that application an order was made by the district registrar by consent that "the whole of this cause be tried before Coard Squarey Pain, Esquire, of Liverpool, architect, as sole arbitrator, who shall have all the powers of certifying and amending of a judge of the High Court of Justice and shall direct judgment to be entered and otherwise deal with the whole action including all questions of costs pursuant to Order XXXVI."

The arbitrator made his award on September 1, 1914, whereby he awarded that the council were entitled to recover 177*l.* on balance, and he ordered judgment to be entered for the council for 177*l.*, with their costs of the action, reference, and award. The costs were taxed at 398*l.*, which with 177*l.* exceeded the amount of the bond, and the council sued the defendants to recover the 500*l.* secured by the bond. The defendants admitted liability to pay the 177*l.*, but denied liability for the costs.

Bailhache J. held that, as the liability to pay the costs arose not under the contract but under the judgment, the defendants were not liable.

The plaintiffs appealed.

*Leslie Scott, K.C.*, and *G. Caradoc Rees*, for the plaintiffs.

*Roche, K.C.*, and *H. A. McCardie*, for the defendants.

In the Court of Appeal the point was taken that the reference was not under clause 12 of the contract, and that therefore the defendants' bond did not cover it.

The COURT (Swinfen Eady, Phillimore, and Bankes L.JJ.), without giving any decision upon the point of law decided by Bailhache J., held that the plaintiffs by agreeing to the reference to Pain in place of that provided by clause 12 of the contract had, without the knowledge or consent of the defendants, entered into

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a new agreement of reference, probably a longer and more expensive reference, which was a departure from the terms of the original contract and was therefore not covered by the defendants' bond; and that consequently the plaintiffs, though they had, as the learned judge found, acted reasonably in the course they took, were not entitled to recover from the defendants the costs of the reference before Pain. The appeal therefore failed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Austin & Austin, for A. E. Caldecutt, Chester.*

Solicitors for defendants: *Broad & Co.*

W. F. B.

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*March* 15, 16; *May* 23.

[IN THE COURT OF APPEAL.]

## BOOTH STEAMSHIP COMPANY, LIMITED *v.* CARGO FLEET IRON COMPANY, LIMITED.

[1914 B. 3922.]

*Sale of Goods—Stoppage in transitu—Vendor's Liability to Carrier for Freight—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 44, 45, 46, 47, 48, 61.

Where goods are stopped while in transit and before they reach their specified ultimate destination by notice from an unpaid vendor, the carrier is bound to act upon the notice by delivering the goods to, or according to the directions of, the vendor, and if he fails to do so he is liable to an action by the vendor for wrongful conversion.

The vendor on his part (although he is not a party to the contract of affreightment) is bound to take the goods or give directions for their delivery on arrival and to discharge the carrier's lien for freight, and if he refuses to perform this obligation he is liable in damages to the carrier for the amount of the freight.

If the conduct of a vendor who has stopped goods in transit prevents them from being carried on to their specified ultimate destination, he is liable for the freight not only in respect of the whole voyage to the place at which the goods are in fact landed, but also to the ultimate destination.

The effect of stoppage in transitu is not to rescind the contract

between the carrier and the purchaser or to vest the property in the goods in the unpaid vendor.

*Pontifex* v. *Midland Ry. Co.* (1877) 3 Q. B. D. 23 observed upon.

The right of stoppage in transitu considered and explained.

Defendants, who were manufacturers in England, sold goods to the S. Company, and, acting under instructions given on behalf of that company, delivered the goods to be carried by ships of plaintiffs (who were shipowners trading from the United Kingdom to ports in Brazil) to P. in Brazil. Defendants, although the actual shippers, were not parties to the contract of affreightment with plaintiffs, as by engagements between the S. Company and plaintiffs the former were the consignees and were also treated as the shippers, and the freight was payable by them before the departure of the ship. Before the ships arrived at the port of destination, defendants, hearing that the S. Company was in financial difficulties, gave certain notices to plaintiffs which admittedly amounted to a stoppage of the goods in transitu. On a voyage to P., the ocean transport ended at T., and the carriage onwards was by means of lighters, and the river was navigable by them only when the tide served, namely, two or three times a month. In the ordinary course, if the tide served, the goods were taken from the ship at T. and immediately placed in the lighters for carriage to P.; but if the tide did not serve, the goods were landed by plaintiffs at C. (a small island owned by the plaintiffs in the Bay of T. in Brazil, from which P. was distant sixty miles up a river) and left there until the lighters could carry them to P. There was no bonded warehouse there capable of taking in goods of the bulk shipped in this case, but the practice was that Custom-house guards accompanied the goods to P., and in case of heavy goods, such as the goods here shipped, the duty was assessed and paid in the lighters, and the goods were then "despatched"—this term denoting the passing of the goods through the customs and the payment of the duty on them. If the goods were not sent forward at once for use they had to lie at P. in the open, but they could not be landed there unless the duty had been paid on them. On the receipt of the stopping notice, and before the ships arrived at T., plaintiffs' agents at T. signified their intention to act on the notice, and suggested that defendants should pay the freight and take up the bills of lading (which were in plaintiffs' hands) under a guarantee of indemnity to plaintiffs. Defendants declined to pay the freight. The ships having got to T., plaintiffs told defendants that they were about to land the goods forthwith for their account and asked for their specific instructions, but defendants replied declining responsibility for the landing. In further correspondence plaintiffs expressed their willingness to forward by lighter to P., but insisted that, as defendants had stopped the goods, they were liable for all attendant charges (including freight), and defendants repudiated all responsibility for these things (except expenses incurred, after landing,

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on their behalf), including the duty which had to be paid before the goods could be sent to P. and plaintiffs deposited the goods at C.

By the freight contract plaintiffs had a lien on the goods for unpaid freight. At the time of the trial the goods were still at C.; duty on them had not been paid; plaintiffs had not received their freight, and defendants had not got their purchase-money. Plaintiffs sought to establish and enforce a personal liability on defendants for the freight or for an equivalent amount by way of damages:—

*Held*—(1.) that defendants were liable in damages for breach of the obligation, created by their stoppage notice, to take actual possession of the goods on arrival, and to discharge plaintiffs' lien for freight; (2.) that the damages were the equivalent of proper freight; and (3.) that, as the obstacle to the continuance of the transit to P. was the repudiation of plaintiffs' liability to pay duty, freight, and expenses, the amount of damages was the total freight to P.

THE facts, which are sufficiently stated in the head-note, are taken mainly from the judgment of Lord Reading C.J.

At the trial Bailhache J. gave judgment for the defendants.

The plaintiffs appealed.

*Maurice Hill, K.C.*, and *Hon. M. Macnaghten*, for the appellants. When the unpaid vendor exercises his right of stoppage in transitu —a right which can only be exercised at some place short of the place of destination of the goods—and insists on it, he is then in the position of a shipper who claims to have the goods at a place short of the place of destination. Apart from the stoppage, the vendor is not liable for the freight, but the effect of giving the notice to stop and saying "Give me the goods" is to turn the possession of the carrier into a possession on behalf of the vendor. The vendor then resumes his original possessory lien. By s. 46, sub-s. 2, of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), "when notice of stoppage in transitu is given by the seller to the carrier . . . . he must re-deliver the goods to, or according to the directions of, the seller," and "the expenses of such re-delivery must be borne by the seller." That involves the giving of a direction by the seller, and the direction may be either to re-deliver the goods at the place where they then are or to bring them back to the seller.

If the vendor stops the goods, he must give the carrier directions as to how the goods are to be dealt with, and cannot lie by and refuse to give authority to release the goods from the stop and rely at the

same time on the carrier being satisfied with his own lien. If the goods are stopped at an intermediate port, the vendor must pay the freight for the whole voyage; by stopping he assumes the responsibility of the person who was liable to pay up to the time when the stoppage took place. The right to stop means the right not only to countermand delivery, but to order delivery to the vendor: *The Tigress.* (1) The effect of the stoppage was to put an end to the contract of carriage and revest the property in the vendor, and the liability for freight under that contract is therefore gone: *Pontifex* v. *Midland Ry. Co.* (2) The fact that the goods were not carried to Paranahyba was due to the defendants refusing to pay the duties and to be responsible for what was necessary in order that the goods should reach their contractual destination.

[SCRUTTON J. referred to *Whitehead* v. *Anderson.* (3)]

*Leck, K.C.*, and *Raeburn*, for the defendants. The consignee's liability for the freight is not affected by a stoppage in transitu, and the contract between them is not thereby determined. The right to stop in transitu includes the right to order delivery to the vendor, and, although it is subject to the carrier's possessory lien for charges due in respect of the carriage of the goods, it is not subject to any general lien which the carrier may have, as against the consignee of the goods, in respect of freight due on other goods: *Oppenheim* v. *Russell* (4); *United States Steel Products Co.* v. *Great Western Ry. Co.* (5) The right of stoppage is an equitable lien, adopted by the law for the purposes of substantial justice: Carver's Carriage by Sea, 5th ed., p. 655.

In *Whitehead* v. *Anderson* (6) Parke B. says that if the vendor takes the goods out of the carrier's possession during the transit without his consent, it may be a wrong for which he has a right of action; but that is because he is stopped from holding the goods under his common law lien. That lien is all he is entitled to as against the seller; he cannot sue him for the freight.

[LORD READING C.J. referred to s. 44 of the Sale of Goods Act, 1893.]

(1) (1863) 32 L. J. (P. M. & A.) 97, 102; Br. & Lush. 38.
(2) 3 Q. B. D. 23, 27.
(3) (1842) 9 M. & W. 518.
(4) (1802) 3 Bos. & P. 42.
(5) [1916] 1 A. C. 189, 195, 202.
(6) 9 M. & W. 518, 534.

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Here neither the plaintiffs nor the defendants are in fault. Both are innocent parties and must be left in their original position. The defendants have done nothing to prevent the plaintiffs from getting their freight from the consignees, who are the only persons liable for it.

The plaintiffs have not carried the goods to the destination named in their contract. [They also referred to Chalmers' Sale of Goods Act, 1893, 6th ed., p. 95.]

*Maurice Hill, K.C.*, replied.

*Cur. adv. vult.*

May 23. LORD READING C.J. This case raises a novel and interesting point of law, of some importance to carriers and merchants, namely, whether an unpaid vendor who has stopped goods in transitu can be made liable for the freight on the goods, or for damages for having prevented the carrier earning the freight.

The plaintiffs claim to recover freight or damages from the defendants, the unpaid vendors of certain goods carried by the plaintiffs and consigned to the purchasers. The defendants were not parties to the contract of carriage, but gave notice of stoppage in transitu whilst the goods were being carried by the plaintiffs. The plaintiffs acted on this notice, and claim that in the circumstances the defendants are liable to them for the amount of the freight on the goods. The defendants deny that they have incurred any liability to the plaintiffs for freight or damages by the giving of this notice or otherwise. Bailhache J. came to the conclusion that the plaintiffs had not completed the voyage, and that they had failed to prove that the defendants had prevented them carrying the goods to their destination and tendering them there, and for these reasons he gave judgment for the defendants. The learned judge did not decide whether the defendants would have been liable to the plaintiffs if he had found in their favour on the facts, but expressed the view that he should have been disposed to grant the relief claimed. From that judgment the plaintiffs appeal.

The plaintiffs are shipowners trading from the United Kindgom to ports in Brazil. The defendants are manufacturers of steel rails and other material used in the construction of railways. They sold certain steel rails and fish-plates to the South American Railway

Construction Company, Limited, which was constructing a railway in Brazil under a concession from the Brazilian Government. In the autumn of 1913 the defendants, acting under the instructions of the British Maritime Trust, Limited, given on behalf of the Construction Company, delivered certain parcels of steel rails and fish-plates to be carried by the plaintiffs' steamships to Paranahyba in Brazil. The defendants were under obligation to deliver the goods "f.o.b. Middlesbrough" or on certain terms "f.o.b. Liverpool," payment to be made in exchange for shipping documents. Six hundred tons of rails and fifty-five tons of fish-plates were shipped at Middlesbrough in the *Napo* and 400 tons were shipped in the *Ravonia* for transhipment at Liverpool into the *Crispin*. The *Napo* and the *Crispin* were steamships owned by the plaintiffs. Although the defendants were the actual shippers of the rails and plates on these vessels for carriage to Paranahyba, they were not parties to the contract of affreightment with the plaintiffs. Under engagements made between the British Maritime Trust, Limited, on behalf of the Construction Company, and the plaintiffs, the Construction Company were the consignees of the goods, and were also treated as the shippers, and the freight was payable by them before the departure of the ship. The mates' receipts for the goods as shipped were received by the defendants and forwarded by them to the plaintiffs, who, after making out the bills of lading, cancelled the mates' receipts and returned them to the defendants. The bills of lading for the goods on the *Napo* and the *Crispin*, dated October 6 and 8, 1913, respectively, were held by the plaintiffs until payment of the freight. The freight has not been paid and the bills of lading have never been issued. The rails and plates were never carried to Paranahyba, their destination under the contract, but were landed at Cajueiro, a small island owned by the plaintiffs in the Bay of Tutoya in Brazil, Paranahyba being situate at a distance of sixty miles from Tutoya up the river. On a voyage to Paranahyba the ocean transport ends at Tutoya, and the carriage up the river to Paranahyba is made by means of lighters. This river is navigable for the lighters only when the tides serve, which occurs twice or thrice in a month. In the ordinary course, and if the tide is serving, the goods are taken from the ship at Tutoya and immediately placed in the lighters for carriage to Paranahyba. If

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the tide does not serve, the goods are landed by the plaintiffs at Cajueiro and are left there until the lighters can carry them to Paranahyba. There is a bonded warehouse at Paranahyba capable of receiving 300 or 400 tons of cargo, but steel rails and fish-plates are never placed in the warehouse. The practice is that Custom-house guards accompany the lighters to Paranahyba, and in the case of heavy goods, such as steel rails and fish-plates, the duty is assessed and paid in the lighters, and the goods are thus "despatched." This term is used to denote the passing of the goods through the customs and the payment of the duty leviable upon them. If the rails are not sent forward at once for use, they must lie at Paranahyba in the open, as there is no warehouse accommodation for them. They cannot, however, be landed at Paranahyba unless the duty has been paid upon them.

On October 14, 1913, the defendants became aware that the purchasers were in financial difficulties, and on that date wrote to the plaintiffs' agents requesting them to refrain from handing over the bills of lading until further notice from the defendants. On October 27, 1913, the defendants gave notice to the plaintiffs in the following terms: "Please arrange to prevent any rails and fish-plates shipped per *Napo* and *Crispin* being handed over to South American Construction Company at Paranahyba without bill of lading or our authority to release." On the same day the plaintiffs' agents wrote to the defendants: "We may say that we have declined to part with the bills of lading for the cargo shipped by you per s.s. *Napo* and s.s. *Crispin* to the shippers, the South American Railway Construction Co., pending payment by them of the freight due, and we now take note that you desire us not to part with them irrespective of this condition. We are forwarding to Messrs. the Booth Steamship Co., Ltd., Liverpool, a copy of your message. They may perhaps address you direct on the subject, as we understand the s.s. *Napo* is getting due at her destination, but, failing this, we will advise you as soon as we receive their reply—the question of lien in a Brazilian port is a difficult one. Would it simplify matters if you paid the freight and took up the bills of lading under a guarantee of indemnity to the shipowners?" On the next day the defendants refused to fall in with this suggestion as to the payment by them of the freight. On October 29, 1913, the defendants

gave the following notice to the plaintiffs: "We beg to enclose copies of letters which we have exchanged with your agents Messrs. Moxon, Salt & Co. Please note that we look to you not to hand over the material shipped per s.s. *Napo* and s.s. *Crispin* to the South American Railway Construction Co., or any one else without authority from us. We give you this notice as we understand you are holding our bills of lading for freight."

It is not in dispute that these letters constituted an effective notice of stoppage in transitu and that the defendants, as unpaid vendors, had the right to give it, and that the plaintiffs accepted it and promised to act upon it. The plaintiffs had no alternative in the matter; they were bound to act upon the notice, and, if they disregarded it and delivered the goods to the consignees, they would be liable to the defendants for damages for wrongful conversion: *The Tigress*. (1) On October 29 the *Napo* arrived at Tutoya; the *Crispin* did not arrive until November 25, 1913. On October 30 the plaintiffs' agents at Middlesbrough advised the defendants of the arrival of the *Napo* at Tutoya, and informed them that it was necessary to take some prompt action to deal with the rails on board the vessel. They added that the plaintiffs were willing to take the defendants' instructions regarding the disposal of the rails, and in this connection would act as agents for the defendants to hold the rails under their orders, subject to the payment of any charges which might be incurred. On October 31, 1913, the plaintiffs wrote to the defendants: "We beg to confirm our telegram of to-day as follows: 'Acting on your instructions we shall not surrender bills of lading to the South American Railway Construction Co. without your authority. We shall commence landing rails forthwith for your account, holding bills of lading at your disposal.' We shall be glad to have your specific instructions without delay." On the same day the defendants replied: "Telegram received. Note you will not surrender bills of lading without our authority, which is in order. For the rest we cannot accept responsibility for your landing rails at Tutoya." On November 1, 1913, the plaintiffs telegraphed to defendants: "You have instructed us not to deliver the ex *Napo* to the bill of lading consignees, thus stopping the goods on the basis of your lien in transit. We are carrying out your instructions, and

(1) 32 L. J. (P. M. & A.) 97, 101.

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must land cargo at Paranahyba for your account, and look to you for all consequent charges." On November 1, 1913, the defendants wrote to plaintiffs: "While we have nothing to do with the decision you have apparently arrived at for your protection to land the material at Tutoya instead of Paranahyba . . . . we look to you to hold the bills of lading at our disposal, so far as they relate to the goods supplied by us, until further notice." The plaintiffs then advised the defendants to appeal to the judicial tribunal at Paranahyba for restraint of delivery. On November 4, 1913, the defendants requested the plaintiffs to make this appeal in respect of the shipment per *Napo* and *Crispin*, but later, and before effective steps had been taken, withdrew the request (November 26, 1913), stating that "our friends the South American Railway Construction Company have given us their undertaking that they will not deal with the goods, or take any steps to our detriment until our account has been paid." A number of letters and telegrams passed thereafter between the parties and their agents which did not change the situation. The plaintiffs continued to insist that, as the defendants had given instructions to stop the goods and also not to deliver them, the plaintiffs looked to them for all attendant charges, including freight. The defendants, on the other hand, persisted in repudiating all responsibility for freight or other expenses payable by the shippers for the landing of the goods or otherwise. They would only admit responsibility for expenses incurred on their behalf by the plaintiffs after the goods had been landed. The shipowners had carried the goods to Tutoya, and were ready and willing to forward them by lighter to Paranahyba, but it was useless to send them to Paranahyba unless it was intended to pay the duty upon them, as they could not be landed at Paranahyba until the duty had been paid, and, if not paid, the goods must either be brought back to Tutoya or left indefinitely in the lighters. Who was to pay the duty? The unpaid vendors repudiated all responsibility. The consignees were insolvent and could not or in any event would not pay the duty. They could not pay the purchase-money, and had agreed with the defendants that they would not deal with the goods until it was paid. In these circumstances what were the shipowners to do? Clearly they were under no obligation to pay the duty. But the goods must be discharged; they could not

remain in the ship or the lighters; and the ship could not remain indefinitely at Tutoya—neither could the lighters remain indefinitely at Paranahyba or Tutoya. The course taken by the plaintiffs was to deposit them at Cajueiro, where they lie to this day. By the freight contract the plaintiffs have a lien upon the goods for unpaid freight, and the goods are held by the plaintiffs subject to their lien. At the date of the trial the duty had not been paid upon the goods, delivery had not been made at Paranahyba, the plaintiffs had not received their freight, and the defendants had not obtained their purchase-money.

Upon these facts the question arises whether the plaintiffs can recover the freight or damages from the defendants. Bailhache J. thought not. In order to determine whether the learned judge's conclusion was right, it is, in my judgment, necessary to ascertain the legal position of the carrier and the vendor when a valid notice of stoppage in transitu has been given. When goods are stopped, there is usually no difficulty as to the payment of the freight to the shipowner; the vendor pays it in order to discharge the shipowner's lien and to regain actual possession of the goods. The present case is exceptional in that the vendors insist upon the stoppage but refuse to pay the freight. They say to the shipowners: "The goods must not be handed to the consignee because of our notice of stoppage, and we will not take actual possession of the goods as we should have to pay the freight. You must continue to hold the goods subject to our notice of stoppage." The plaintiffs say: "You, the vendors, are the only persons to whom the actual possession of the goods can be given, and you are under obligation to take actual possession, which will involve the payment by you of the freight."

In the circumstances, what are the rights and obligations of the parties? The right of stoppage in transitu was introduced into English law in the seventeenth century, and the first reported case on the subject is in the year 1690—*Wiseman* v. *Vandeputt.* (1) As the right arises only in the case of insolvency, it came to be recognized in our Courts in the first instance through the medium of the bankruptcy jurisdiction of the Lord Chancellor, which was of statutory creation. The right is not peculiar to the law of England;

(1) (1690) 2 Vern. 203.

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it was part of the law merchant existing in most of the commercial States of Europe before it was recognized as part of our law. In 1743 Lord Hardwicke received evidence of the custom of merchants as to stoppage in transitu and then applied the rule. He based his decree both upon the custom proved before him and upon the justice of the case: *Snee* v. *Prescot.* (1) In 1841 Lord Abinger in *Gibson* v. *Carruthers* (2) gave a full and interesting account of the history of the introduction of stoppage in transitu into our law and reviewed the authorities. He referred to the opinions expressed by Courts of Equity that the right was founded upon some principle of the common law and of the practice in Courts of Law to call the right a principle of equity which the common law had adopted. He pointed out the difficulty, owing perhaps to its foreign parentage, of reducing this right to some analogy with the principles which govern the law of contract as it prevails in this country between vendor and purchaser. This difficulty, in spite of decisions and legislation, has not been entirely solved. Lord Abinger came to the conclusion that the right had been adopted as part of the law merchant and formed part of the common law of England.

What is the right? It is the right of the unpaid vendor, on discovery of the insolvency of the buyer, and notwithstanding that he has made constructive delivery of the goods to the buyer, to retake them if he can before they reach the buyer's possession. It is a right founded upon the plain reason that one man's goods shall not be applied to the payment of another man's debt: *D'Aquila* v. *Lambert* (3); Benjamin on Sale, 5th ed., p. 870. It is the right not only to countermand delivery to the purchaser but to order delivery to the vendor: *The Tigress* (4); *United States Steel Products Co.* v. *Great Western Ry. Co.* (5), per Lord Atkinson. Dr. Lushington adds, in *The Tigress* (4), "Were it otherwise, the right to stop would be useless, and trade would be impeded." That the vendor has the *right* to order delivery to himself cannot be disputed, but does the notice to the carrier place the vendor under *obligation* to the carrier to take delivery or to give directions for delivery of the goods? I think it does. The goods have been received by the

(1) (1743) 1 Atk. 245.
(2) (1841) 8 M. & W. 321, 338.
(3) (1761) 2 Eden, 75.
(4) 32 L. J. (P. M. & A.) 97, 102.
(5) [1916] 1 A. C. 189, 202.

carrier to be delivered to the purchaser. When the vendor has placed the goods in the actual possession of the carrier he has performed his contract of sale and has made delivery to the purchaser. The property in the goods and the right to possession have passed to the purchaser, but the notice of stoppage operates to defeat the purchaser's right to the possession of the goods and transfers it to the vendor. Although doubts existed in the past as to whether or not the contract of sale was rescinded by the exercise of the vendor's right of stoppage in transitu, they have long since been dispelled: *Kemp* v. *Falk* (1), per Lord Blackburn; and the law is now to be found in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). Stoppage in transitu is dealt with in the statute by ss. 44 to 48. By s. 61, sub-s. 2, the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, continue to be applicable to contracts for the sale of goods. By s. 48, sub-s. 1, it is provided that the mere exercise by an unpaid vendor of his right to stop in transitu does not rescind the contract of sale: see also *United States Steel Products Co.* v. *Great Western Ry. Co.* (2), per Lord Atkinson. The vendor may resell the goods, provided he has complied with certain conditions, and recover damages from his original buyer for loss occasioned by the breach of the contract: s. 48, sub-s. 3. But after the notice is given by the vendor to the carrier the right to possession of the goods is resumed by the vendor; that is the effect of the notice, and the carrier is under obligation to give actual possession to the vendor only or according to his directions. To use the words of the codifying statute, the carrier "must deliver the goods to or according to the directions of the seller": s. 46, sub-s. 2. The carrier cannot be under obligation to deliver the goods upon arrival to the purchaser, his consignee, and also to the vendor who has given notice of stoppage. From the giving of the notice, and so long as the notice is operative, his obligation is to deliver, not to the consignee, but to the vendor.

It was argued in this case that the vendor obtained all the benefits of the notice without incurring any liabilities. As I have already said, I cannot accept this argument. The vendor, by the act of giving notice of stoppage, has prevented the shipowner making

(1) (1882) 7 App. Cas. 573, 581. (2) [1916] 1 A. C. 189, 203.

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delivery to his consignee, and the vendor, in my judgment, is under the correlative obligation to the shipowner to take delivery or give directions for delivery. If there is a lien for freight due in respect of the goods, the vendor's obligation to take delivery involves the further obligation upon him to pay the freight, for he cannot get actual possession until he has discharged the shipowner's lien for freight due in respect of the carriage of the goods in question, but not in respect of freight due by the consignee to the shipowner on other goods: *Oppenheim* v. *Russell* (1); *United States Steel Products Co.* v. *Great Western Ry. Co.* (2) Although there is no decision to be found in the books making the vendor liable in these circumstances for the freight upon the goods stopped by him, I think the earlier cases point in the direction of such an obligation upon him.

The history of the recognition of this right of stoppage in transitu in English law is that, at first, it was thought actual possession of the goods was necessary to constitute a valid stoppage in transitu. Lord Hardwicke was at one time of this opinion: see *Snee* v. *Prescot* (3); but later it was held that actual possession by the vendor was not necessary. In 1787 it was held by Grose J. in *Lickbarrow* v. *Mason* (4) that "it is now the clear, known, and established law that the consignor may seize the goods in transitu, if the consignee become insolvent before the delivery of them." In 1798 Lord Kenyon said in *Northey and Lewis* v. *Field* (5): "The Courts had of late years leaned much in favour of the power of the consignor to stop his goods in transitu; it was a leaning to the furtherance of justice. Lord Hardwicke had been of opinion, that in order to stop goods in transitu, there must be an actual possession of them obtained by the consignor before they come to the hands of the consignee; but that rule had since been relaxed; and it was now held that an actual possession was not necessary, that a claim was sufficient, and to that rule he subscribed." In 1802 Lord Alvanley expressed the same view in *Oppenheim* v. *Russell*. (6) He said: "This was an action brought by the plaintiffs as consignors against

(1) 3 Bos. & P. 42.
(2) [1916] 1 A. C. 189, 203.
(3) 1 Atk. 245.
(4) (1787) 1 Sm. L. C., 12th ed. 726, 740.
(5) (1798) 2 Esp. 613, 614.
(6) 3 Bos. & P. 42, 46.

a carrier for the recovery of goods, and it is stated upon the case that the goods were demanded by the plaintiffs before they either actually or constructively reached the hands of the consignee. According to the general rule the carrier under these circumstances was bound to deliver them and was liable, as Lord Kenyon very properly determined, to an action of trover if he did not deliver them. Though no act of seizure ensue, yet if tender be made of the sum due for the carriage, the person sending the goods has the right to resume them; and that was done in this case." In *Litt* v. *Cowley* (1) Gibbs C.J., referring to past cases, said: "It was formerly held, that the only way of stoppage in transitu was by actual corporal touch of the goods. It has since been held, that after notice to a carrier not to deliver, he is liable for the goods in trover against himself, if he does deliver them."

Now by s. 44 of the statute, when the buyer becomes insolvent, the unpaid vendor has the right to resume possession of the goods so long as they are in course of transit, and he has rights of sale under s. 48. The method of effecting the right of stoppage is by taking actual possession of the goods, or by giving notice of the claim to the carrier or other bailee in whose possession the goods are: s. 46, sub-s. 1.

The statute thus gives two ways of effecting stoppage. The first is by taking actual possession, and the second by notice of claim, the latter, as Lord Kenyon observed, being a relaxation of the old rule that required actual possession to be taken. To get actual possession of goods carried the vendor must discharge the ship-owner's lien (if any) for freight. Therefore satisfaction of the lien for freight must have been and still is an integral part of the stoppage of goods in transitu by the method of taking actual possession. Actual possession can only be taken of goods in transit when the goods arrive; by s. 45, sub-s. 1, they are deemed to be in transit until the buyer takes delivery—until that time there is a right in the unpaid vendor to resume the possession on arrival if he can. If the stoppage is by means of notice given, the vendor, upon arrival of the goods, is in the same position as if he had taken actual possession of the goods—that is to say, he is the sole person entitled, and, as I think, obliged, to take or order delivery of the goods. He

(1) (1816) 7 Taunt. 169, 170.

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cannot get actual possession unless he is ready and willing to discharge the lien for freight. I am therefore of opinion that a notice of stoppage given during the transit, and persisted in upon arrival of the goods, involves an obligation upon the vendor to discharge the shipowner's lien for freight, that is, to pay the freight due in respect of the goods carried. To get the goods he must free them from the lien.

There being, then, an obligation upon the vendor to take delivery and discharge the lien by paying the freight, it follows that, if he repudiates the obligation and so conducts himself as to prevent the shipowner completing his voyage and earning his freight, an action can be maintained by the shipowner against the vendor for damages for the breach of the obligation created by the notice to take actual possession of the goods upon arrival, and to discharge the shipowner's lien for the freight in respect of the goods. The damages may be the equivalent of the freight.

Having arrived at this conclusion, it must now be considered whether in the present case the plaintiffs' right of action is defeated by their failure to complete the voyage to Paranahyba. Bailhache J. decided, without determining whether or not there would otherwise have been a right of action in the plaintiffs, that they could not recover because the plaintiffs had not proved that the defendants had prevented the completion of the voyage. With all respect to the learned judge I cannot arrive at the same conclusion, having regard to my view of the legal position of the defendants. In my judgment, when the goods arrived at Tutoya, the plaintiffs were ready and willing, then and at all material times, to complete the voyage and carry the goods to Paranahyba. The obstacle to the continuance of the voyage was the non-payment of the duty and the repudiation by the defendants of all responsibility for freight, charges, or expenses. For the reasons already given, I think this was a repudiation of their obligation to take delivery, and that they were bound to provide the duty, or to make arrangements for its payment, so as to enable the voyage to be completed. As they refused, the goods were landed and are still at Cajueiro. In my opinion the plaintiffs are entitled in these circumstances to treat the voyage as completed, and to recover, as damages for the breach of the obligation, the full amount of freight which they would have

earned had the voyage been completed : see *Stewart* v. *Rogerson*. (1) They claim, and I think rightly, to be placed in the same position as if the vendors had discharged their obligation and enabled the voyage to be continued to Paranahyba. It is immaterial that, after the repudiation by the defendants, the plaintiffs acted in their own interests and for their own protection as regards the freight.

The defendants strenuously contended that *Pontifex* v. *Midland Ry. Co.* (2) was a decision which supported their view, but upon examination of that case I do not think it has any bearing upon the problem now before the Court. There the vendor had given to the defendants, a railway company, notice of stoppage in transitu of goods consigned to the purchasers; but the railway company refused to act on the notice and delivered the goods to the consignee. The vendor thereupon brought an action for damages for the wrongful conversion of the goods, and the sole question in dispute in the case was whether the plaintiff, having recovered a sum exceeding 10*l*., was or was not to be deprived of costs. The decision turned upon the meaning of certain words in s. 5 of the County Courts Act, 1867, and the question was whether the action was "founded on tort," and not on contract, within the meaning of that section. The Court held that it was founded on tort, and Cockburn C.J., in delivering the judgment, said (3) : "The difficulty arises in a case like the present, where there is undoubtedly an unauthorised intermeddling with property, but the act is connected with a contract originally entered into, and there is ground for regarding it as founded on that contract, or some new contract implied from the circumstances"; and later on he says (4) : "The contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to that contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods and the dealing with them by the defendants became tortious." And this agrees with the view which was always taken of such a case when the action for trover existed, for such a misdelivery after notice was always treated as a wrongful conversion.

The defendants argued that this case established that the

(1) (1871) L. R. 6 C. P. 424.
(2) 3 Q. B. D. 23.
(3) 3 Q. B. D. 26.
(4) Ibid. 28.

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refusal of the carrier to act upon the notice, and the delivery by him of the goods to the purchaser notwithstanding the notice, was a tortious act and not the breach of a contractual obligation. The decision was that an action for wrongful conversion of the goods was an action "founded on tort" within the meaning of the section, notwithstanding that there might be ground for regarding it as an action founded on "some new contract implied from the circumstances," just as an action by a passenger against a railway company for damages for personal injuries caused by the negligence of the defendants in the conveyance of passengers has been held under similar statutes to be founded on tort notwithstanding that it might also be founded upon contract: *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) In the present case the plaintiffs had not refused to act upon the notice, but, on the contrary, had expressly agreed with the vendors, upon receipt of the notice, that they would act upon it.

I am of opinion, for the reasons expressed, that this appeal should be allowed and judgment entered for the plaintiffs for 2743*l.* 14*s.* 7*d.*, with costs here and below.

WARRINGTON L.J. The plaintiffs are shipowners. Under a contract of carriage entered into by them with the South American Railway Construction Company they carried in the autumn of 1913 in two ships called the *Napo* and the *Crispin* certain parcels of steel rails and other railway material from ports in England to Tutoya, a place on the coast of Brazil. The ultimate destination of the goods was Paranahyba, a place about sixty miles up a river from Tutoya, from which the goods have to be conveyed in lighters. Tutoya is the end of the ocean transit. The defendants are the vendors of the goods to the Construction Company. The contract of carriage was not made with them, nor were they in any sense parties to it. Believing, as it turned out to be the fact, that the Construction Company was insolvent, the defendants exercised their right of stoppage in transitu by giving the proper notice to the plaintiffs. Though the contract of carriage provided for payment of the freight in London and Liverpool respectively before the departure of the steamers, the freight was and still remains unpaid. For reasons

(1) [1895] 1 Q. B. 134.

sufficient and intelligible from their own point of view the defendants have not seen fit to take actual delivery of the goods to themselves or to give directions for their delivery to any other person. The plaintiffs' lien for freight remains effective with such rights as are attached to it. The plaintiffs have not parted with the actual possession of the goods.

The plaintiffs, by the present action, seek to establish and enforce a personal liability on the part of the defendants for the freight or for an equivalent amount by way of damages.

There was at first some uncertainty as to the mode in which their case was presented, but before the close of the argument it was, I think, made clear that they asserted as against the defendants a contractual or quasi-contractual obligation arising out of the relation brought about by the stoppage in transitu. The case was put in this way: That by preventing delivery to the consignees the defendants ought to be treated as put in their place, and, while they are on the one hand entitled to require delivery of the goods to themselves, or according to their directions, they are on the other hand bound to accept or give directions for such delivery and thus incidentally to pay the freight. Before the learned judge the matter was dealt with in a somewhat different way. It appears to have been assumed on the facts that the contract of carriage was not performed by the plaintiffs so as to entitle them to recover from the buyers because they did not carry the goods from Tutoya to Paranahyba, but landed them on an island belonging to themselves off the former port; and it was alleged by the plaintiffs that they were prevented by the action of the defendants, in neglecting either to take delivery of the goods or to give directions for delivery, from performing their duty and earning their freight, and that the defendants must make good the amount of freight by way of damages for such neglect. The learned judge, on the facts, came to the conclusion that, assuming the contract of carriage had not been performed, the plaintiffs had not established that they were prevented from so doing by the action of the defendants, and on that ground gave judgment for them. In the view he took it became unnecessary for him to consider whether there lay upon the defendants the obligation the neglect of which was relied on in support of the plaintiffs' claim.

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Warrington L.J.

I have come to the conclusion on the facts that, as between the plaintiffs and the defendants at all events, the plaintiffs have, in the peculiar circumstances of this case, done all that was reasonably necessary to entitle them to require the defendants to take delivery of the goods if the latter are in law bound to do so.

At Tutoya there is no Custom-house or bonded warehouse of any kind. All goods have to be conveyed to Paranahyba in lighters. The bonded warehouse at Paranahyba is unsuited for the accommodation of a cargo such as that in question. Inasmuch as the defendants refused to pay the duties and thus enable the goods to be despatched at Paranahyba, the only practical course, in my opinion, was that adopted by the plaintiffs, namely, to deposit the goods on their own island at Tutoya.

I think, therefore, the question of law avoided by the learned judge arises, and I proceed to deal with it. The question is: "Does the unpaid vendor of goods, by exercising his right to stop them in transitu, bring himself under a personal obligation to the carrier to take, or give directions for, delivery of the goods, involving, of course, the discharge of the carrier's lien for unpaid freight?" I think it must be answered in the affirmative. The question seems to be an entirely novel one. It can only arise in a very rare case such as the present, where, owing to the nature of the goods and the circumstances surrounding them at the end of the transit, it is not worth the vendor's while to take actual possession.

There is no direct authority to be found in support of or against the plaintiffs' claim, and I think a solution of the question must be found in an examination of the nature of the right of stoppage in transitu. It is a right to resume possession of the goods. The vendor, by the contract of sale, has transferred the property therein to the purchaser, and by delivery to the carrier has also transferred the possession thereof. If the vendor is unpaid and the purchaser is insolvent, the former may resume possession. He may do so either physically—in which case of course the lien for freight has ex hypothesi been discharged or released—or he may do so by giving notice to the carrier of his claim, and the latter must then deliver the goods to or according to the directions of the vendor. This is, in my opinion, merely an alternative mode of resuming possession, and appears to have been introduced as a relaxation of the previous

stricter rule, which required physical possession in order to the effective exercise of the right of stoppage: see Lord Kenyon C.J. in *Northey and Lewis* v. *Field*. (1) Are we to say that the vendor is at liberty to give notice to the carrier of his claim and yet to refuse to take delivery himself or to give directions therefor, leaving the carrier with no person to whom the goods can be delivered? So to hold would be to impose a very serious burden on the carrier. Under the contract of carriage his obligation is to deliver to the consignee. The vendor's notice prevents him from so doing, and, if the vendor is entitled to refuse to take delivery himself, or to give directions for delivery to some one else, it is difficult to see how the carrier is to rid himself of the goods. The whole doctrine of stoppage in transitu appears to have originated in the law merchant and to have been founded on the customs of traders, and I cannot believe that it can have been part of such customs to leave the carrier in such a position that he has goods of which he can require nobody to relieve him at the end of his transit.

I think on the whole, seeing that the power of stopping in transitu by notice is one of two forms of resuming possession, it may fairly be held that the right thereby conferred of obtaining possession is accompanied by the correlative duty of actually obtaining it, with the necessity, if freight is unpaid, of paying the freight and thus discharging the carrier's lien.

The vendor's obligation seems to me to arise, not because he becomes directly liable to perform the purchaser's part of the contract of carriage, including the payment of freight,—this, in my opinion, he does not—but from the relation into which he enters with the carrier by placing him in such a position that he cannot deliver to the consignee or to any one else but the vendor or according to his directions.

I think, therefore, that the appeal ought to be allowed, and that the defendants ought to be ordered to pay to the plaintiffs the sum claimed, being that which they would have had to pay in order to obtain delivery of the goods.

SCRUTTON J. The Booth Steamship Company, whom I call "the shipowners," brought an action against the Cargo Fleet Iron

(1) 2 Esp. 613.

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Company, Limited, whom I call "the vendors," for a sum of 2743*l.* 14*s.* 7*d.* as freight or damages. The defendants allege that in the events which happened they are under no liability to the plaintiffs. Bailhache J. has given judgment for the defendants, the vendors, and the plaintiffs, the shipowners, appeal to this Court.

The facts are shortly as follows: The vendors sold to the South American Railway Construction Company, Limited, whom I call "the purchasers," certain rails "f.o.b. Middlesbrough. Payment against shipping documents in London." This contract contemplates that the vendors shall receive the shipping documents from the ship and hold them against the price. The purchasers made a freight engagement with the plaintiffs, the shipowners, under which the goods were to be carried to various Brazilian ports at shippers' option, including Paranahyba, "freight payable by the shippers in London or Liverpool before the departure of the ship." The vendors shipped goods f.o.b. Middlesbrough, but, in circumstances not clearly stated, the ships' and purchasers' agents followed a course of business by which on shipment the ships' agents received and cancelled the mates' receipts. They cancelled them because they drew up bills of lading against them ready to be handed against payment of freight to the purchasers with whom they had made the freight engagement; and they sent the mates' receipts to the vendors as evidence of shipment, but cancelled, so that the vendors, with whom they had no freight engagement, could not claim bills of lading against them. The vendors, as between themselves and the purchasers, might probably have objected to this course of business, which prevented their having shipping documents to hold against payment of the price, but they did not do so before the shipments in question in this action. On September 29, 1913, 400 tons of rails were shipped by the defendants, the vendors, at Middlesbrough in the *Ravonia* for transhipment at Liverpool into the *Crispin*, bound for Paranahyba. On October 4, 600 tons of rails were shipped by the vendors at Middlesbrough on the *Napo*, bound for Paranahyba. Apparently in each case the ships' agents prepared bills of lading in accordance with the mates' receipts, cancelled the mates' receipts and sent them to the vendors, and held the bills of lading against payment of freight by the purchasers, to

whom they rendered an account for freight. The bill of lading by the *Napo* made the purchasers shippers, and delivery was to be at "Tutoya (Paranahyba)" to the purchasers or their assigns, freight to be payable by the shippers in London before the departure of the ship. A lien was given for freight, whether payable in advance or not. The shipowners were not liable for any "duties or taxes." "Any duty, tax, or impost of whatever nature, levied by any authority at the ports of transhipment, destination, or elsewhere upon the ship, for or in respect of the goods at any time between the signing of this bill of lading and the delivery of the goods shall be paid on demand by, or collected from, the shippers or consignees at ship's option." The bill of lading by the *Crispin* was in the same terms, except that the destination was stated to be Paranahyba, and the freight was payable at Liverpool. Both bills of lading included other goods shipped by the purchasers but not supplied by the vendors.

At the beginning of October, 1913, the purchasers were in pecuniary difficulties, owing to some dispute with the Brazilian Government as to the payment of instalments. The vendors then appear to have found that they had not shipping documents. On October 14 they asked the shipowners not to deliver bills of lading for the *Napo* and *Ravonia* (*Crispin*) to the purchasers without their consent; and in future to give them separate bills of lading for their parcel. The shipowners agreed to the first request; and as to the second replied, as was true, that their carrying arrangements were with the purchasers, not with the vendors.

The purchasers did not pay either freight to the shipowners or the cost of the rails to the vendors, and accordingly on October 27 the vendors, being unpaid, gave the shipowners' London agents a notice—"Please arrange to prevent any rails and fish-plates shipped per *Napo* or *Crispin* being handed over to South American Construction Co. at Paranahyba without proper bill of lading, or our authority to release"—which has been treated throughout as a notice to stop in transitu. The shipowners' agents treated this as a notice to hold the bills of lading to the order of the vendors, whether freight was paid or not, forwarded it to their principals, and added, with great prudence from their point of view, "Would it not simplify matters if you paid the freight and took up the bills of lading under a

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guarantee of indemnity to the shipowners?" To which the vendors, with equal prudence from their point of view, replied: "We do not see our way to fall in with your suggestion." The shipowners were at first disposed to take the view that the vendors had nothing to do with the bills of lading; but, after taking legal advice, expressed their willingness "to take the vendors' instructions regarding the disposal of the rails at Tutoya," "and in this connection we would of course act as your agents subject to the payment of any charges which may be incurred." Meanwhile, on October 29, the vendors gave a notice: "Please note that we look to you not to hand over the material shipped per the s.s. *Napo* and s.s. *Crispin* to the South American Railway Construction Co., or any one else without authority from us. We give you this notice as we understand you are holding the bills of lading for freight." This is a genuine "stop in transitu" notice, subject to the point that, while it gives directions not to hand the goods to the purchasers, it gives no positive directions what is to be done with them. The shipowners at once instructed their Maranham agents to stop discharge, giving as the reason "difficulties payment freight and cargo." The Maranham agents passed this on to the Paranahyba agent, but only gave as the reason "difficulties payment freight." Bailhache J. notes this, but as it was partly corrected in two days and wholly corrected by November 6, and discharge was in every event stopped, I attach no importance to the variation. On October 29 the *Napo* arrived at Tutoya.

Cargo for Paranahyba, which is sixty miles up a river which flows into the bay on which Tutoya is situated, only goes in the ocean ship to Tutoya. It is then transhipped into lighters, which are towed up the river to Paranahyba at such times as the draught of water permits, sometimes only three days a month. The stock of lighters will hold about 175 tons of cargo, enough for the ordinary cargo from a steamer for Paranahyba. With vessels like the *Napo*, carrying 950 tons of rails for one shipper for Paranahyba, it is necessary, to avoid detaining the ship, to put the cargo ashore on an island called Cajueiro, belonging to the shipowners, whence it is gradually removed by the lighters. The Custom-house is at Paranahyba, and will hold some 300 or 400 tons of cargo. Goods like rails are not put in the Custom-house, but in charge of the

customs officials on the beach, and in this case before they are landed on the beach the customs duties must be paid. The customs officials come down to Tutoya and accompany the lighters to Paranahyba. If things were going smoothly, probably in this case the goods would be admitted free of duty under the purchasers' concession and landed and taken away by them. But if goods were not landed by the purchasers, but by the vendors and/or shipowners to secure their lien, duty must be paid before the goods were landed at Paranahyba, and, if not paid, the goods would either stay in the lighters or be taken back to Cajueiro island and there stored. If the purchasers were not to receive the goods because they had not paid cost and/or freight, some one, the vendor or the shipowner, must pay the duty, or else it was no use going through the formality of lightering the goods from Tutoya to Paranahyba in order to lighter them back again.

On October 31, by telegram and letter, the shipowners told the vendors they were going to land the rails, i.e., at Tutoya, and asked for further specific instructions. The vendors replied: "We cannot accept responsibility for landing rails at Tutoya." They did not, I think, understand that the greater part of the rails must, anyhow, be landed at Tutoya before they went into lighters, or that duty must be paid before they could be landed on behalf of the vendors at Paranahyba. Discharge of the *Napo* began on October 31. On November 1 the shipowners wired: "You have instructed us not to deliver the cargo ex *Napo* to the bill of lading consignees, thus stopping the goods on the basis of your lien in transit. We are carrying out your instructions and must land cargo Paranahyba for your account and look to you for all consequent charges," and wrote repeating the telegram and adding: "We are, however, advised that the wisest procedure for your protection is to file a formal legal protest with the federal judge's representative at Paranahyba, appealing for restraint of delivery; and we shall be glad of your specific instructions on this point at the earliest possible moment. We should like to say that we are desirous of helping you in this matter, and, if you think well to follow the procedure suggested, we shall be glad to place the services of our Paranahyba agents, Messrs. Booth & Co., at your disposal." Crossing this came the vendor's letter: "We have yours of yesterday

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and confirm ours of the same date. While we have nothing to do with the decision you have apparently arrived at for your own protection, to land the material at Tutoya instead of Paranahyba, or any additional expenses that may be occasioned thereby, we look to you to hold the bills of lading at our disposal until further notice," which still misunderstands the reason of landing at Tutoya. The matter was made more difficult by the fact that, for reasons of their own connected with their quarrel with the Brazilian Government, the purchasers were delighted not to receive the rails, and did not intend to make any endeavour to get them. On November 3 the shipowners state what they then propose to do: "You seem to have misunderstood our intended action with regard to the discharge of the rails. These we will land, ex the lighters, at Paranahyba (not Tutoya), thus fulfilling the bill of lading contract, for which you have made yourselves responsible by the instructions which we have accepted from you. We await your instructions with regard to the suggested legal protest at Paranahyba." And on November 4 the vendors ask them to take legal proceedings at Paranahyba to restrain delivery. This is the only instruction to do anything which the vendors ever gave, and they revoked the instructions on November 26.

On November 7 the vendors again repudiate liability for freight and expenses payable by the shippers, which would include the duty, but admit it for "expenses incurred by you on our behalf after the goods have been landed." They apparently thought, wrongly, that the goods could be landed without paying duty and kept in some safe place for them. On November 8 the shipowners' agents wire that only an "embargo with documents proving non-payment" will prevent delivery of cargo to consignees. On November 11 the shipowners again put forward their claim on the vendors for freight: "You appear to have forgotten that you have not only given us instructions to stop the goods in transitu, but also instructions not to deliver. This being so, you are, as far as we are concerned, the owners of the goods, and we must look to you for all attendant charges including freight"; and received another repudiation: "We have told you all along that we will not be in any way responsible for the freight and landing charges. We have no contract with you whereby we are liable for the freight and landing charges.

You have your right to freight against the South American Railway Construction Co. and also your lien on the goods, and we do not ask you, and have never asked you, to part with possession of the goods until the freight has been paid. All we have done is to give you notice that we are unpaid vendors, and to ask your assistance to enable us to get payment of the purchase-money, but we are not prepared, as we have previously stated, to make ourselves responsible for the payment of the freight and landing charges or to take delivery of the goods on any such condition "—a repudiation which entirely omits to say what is to happen to the goods stopped and where they are to be put. The letter of November 13 from the shipowners to their Paranahyba agents, a letter not referred to by Bailhache J., shows that the shipowners were then acting on the view that they must look for their freight to those who had given them instructions to stop in transitu, the vendors, and not claim it against the purchasers, except in the case of some rails by the *Crispin*, for which the suppliers, Dorman, Long & Co., had been paid, and which therefore they had not stopped in transitu.

Following the letter of November 13 the shipowners instructed an embargo in the case of the *Crispin* for the cost and freight of the vendors' rails in the names of the vendors; it does not appear the vendors were told of this. The *Crispin* arrived at Tutoya on November 25. But on November 26 the vendors made a surprising communication to the shipowners, writing: "In reply to your letter of the 25th inst., we beg to inform you that we have decided not to give the suggested power of attorney to your firm at Paranahyba, as our friends, the South American Construction Company, have given us their undertaking that they will not deal with the goods or take any steps to our detriment until our account has been paid. We are, therefore, for the present not taking any further steps for the protection of our interests in these cargoes." The vendors agree with the consignees that the consignees shall not receive the goods: the vendors themselves will not give any instructions to the ship as to the goods, except that they are not to be delivered to the consignees.

On November 29 the plaintiffs' agents propose to send all possible rails, except the Dorman Long rails, ex *Crispin* to Paranahyba at once; but on December 2 they call the shipowners' attention to the

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fact that duty will have to be paid on rails they embargo on their behalf, and on December 3 they send a very important telegram to the effect that the purchasers' representatives do not want the rails at Paranahyba, and will not sign the necessary document; that the rails are not through the Custom-house and will not be allowed to discharge, and that the rails are on the island of Cajueiro except three lighters which they now propose to discharge there.

There the matter stops—with the rails at Cajueiro, because no one will pay the duty on them and receive them at Paranahyba, where the shipowners are quite ready to send them, subject to the lien for freight. The purchasers refuse to receive them or pay for them; the vendors, who have stopped them in transitu, will not give any instructions what to do with them; and the question now is whether in any way the vendors are liable to the shipowners for the freight on them.

The rest of the history is that the purchasers having gone into liquidation, on February 23, 1914, the vendors wrote to the receiver that they had stopped delivery in transitu and claimed ownership of the goods. They could not at this time have had more than possession of the goods through the shipowners, if they had that. Two days later they told the liquidator they proposed to sell the goods. The receiver would have nothing to do with the goods. The vendors persisted in their refusal to pay freight, and have by this time probably lost the goods.

The plaintiffs, the shipowners, alleged in their statement of claim that in stopping in transitu it became the duty of the vendors to give directions for the delivery of the cargo, and to pay freight and expenses, and they claimed either the freight or the same amount in damages. The defendants, the vendors, denied their liability, and raised the question whether the shipowners had any right to stop the transit at Tutoya. Bailhache J. states the question to be whether the completion of the voyage was prevented by the vendors' action in giving the stop notice, and finds that the plaintiffs have failed to satisfy him that they were prevented by the stop notice given by the defendants "from performing their freight contract, carrying these rails to Paranahyba, and making a tender of them there." I do not understand to whom the learned judge suggested they should be tendered. The vendors had forbidden the ship-

owners to tender them to the purchasers; and had refused to take them themselves. To land them at Paranahyba would risk their seizure by the Government, or their coming into the possession of the purchasers, neither of which the vendors desired, and would involve the payment of duties which the vendors would not, and the shipowners were not bound to, pay. I do not think either the vendors or the purchasers could complain of the goods not going forward from Tutoya to Paranahyba, or, if otherwise liable, use it as an excuse for not paying freight. The judge thinks the landing at Tutoya was to protect the shipowners' lien for freight. I think he has overlooked that on November 28 the shipowners were only putting an embargo for freight on the goods not stopped in transitu, and were looking to the vendors for their freight.

I should, therefore, on the evidence come to a different conclusion from Bailhache J., and find that in the circumstances the shipowners had done all that was necessary to claim freight from whomsoever was liable. If the judge below had found that, he states, without giving reasons, that the inclination of his opinion is that the plaintiffs would succeed in their claim. Whether this is right raises very difficult questions of great general importance on the nature and consequences of the right of stoppage in transitu, which I now proceed to consider.

The right of stoppage in transitu came into the English law in the seventeenth century from the custom of merchants, both English and foreign—a custom, therefore, which had grown up with no special reference or congruity to the English law. As it enabled an unpaid vendor whose purchaser was insolvent to exercise some control over goods in which he had no property and of which he had no possession, while in the hands of a shipowner with whom he had no contract, and to prevent that shipowner from performing a contract to which the unpaid vendor was no party, it was obvious there would be considerable difficulty in fitting in this international usage and the national law. As Lord Abinger says, in the well-known judgment in *Gibson* v. *Carruthers* (1), "In Courts of Equity it has been a received opinion that it was founded on some principle of common law. In Courts of Law it is just as much the practice to call it a principle of equity, which the common law has adopted. . . . .

(1) 8 M. & W. 321, 338, 339, 340.

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Many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee. . . . ." And, again, he refers to " the reasoning and dicta by which it has been attempted, not very successfully, to develop the principle, and to make it conformable in appearance and dress . . . . with the family of English law into which it has been adopted."

Great difference of opinion has existed as to the nature of the right—whether or not stoppage in transitu revested the property and cancelled the contract. In 1761, in *D'Aquila* v. *Lambert* (1), it was said that the goods of one man (i.e., the unpaid vendor) should not be applied in payment of another man's (i.e., the purchaser's) debts, and as late as 1877 Cockburn C.J. in *Pontifex* v. *Midland Ry. Co.* (2) said that the effect of the stoppage in transitu was " to revest the property " in the unpaid vendor. Yet it is clear now that it does not, but only enables him to resume possession. In 1842 it was quite an open question whether stoppage in transitu entirely rescinded the contract, or only replaced the vendor in the same position as if he had not parted with possession: *Wentworth* v. *Outhwaite.* (3) As late as 1885 Cotton L.J. in *Phelps, Stokes & Co.* v. *Comber* (4) treated it as still an open question, though he preferred the latter alternative.

Fortunately, in 1893 the Sale of Goods Act, purporting to codify the common law, and (see s. 61, sub-s. 2) preserving " the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act," finally settled some of the doubtful points. The right of stoppage in transitu does not by its mere exercise rescind the contract of sale: s. 48, sub-s. 1. It is a resumption of possession, made while the goods are in course of transit, entitling the unpaid vendor to retain the goods until payment or tender of the price: s. 44. But it is more than a mere lien, for the unpaid vendor may, if the goods are perishable, or if, after notice to the buyer of intention to resell, the buyer does not within a

(1) 1 Amb. 399, 400.

(2) 3 Q. B. D. 23, 27. [" Property " is constantly used in our older books to signify the immediate right to possess.—F. P.]

(3) (1842) 10 M. & W. 436, 452.

(4) (1885) 29 Ch. D. 813, 821.

reasonable time tender the price, resell the goods, and claim damages from the buyer for any loss occasioned by breach of contract: s. 48, sub-s. 2. The unpaid vendor may retake actual possession if he can get it. If the unpaid vendor "had got the goods back again by any means, provided he did not steal them, I would not blame him," said Lord Hardwicke in *Snee* v. *Prescot* (1); or he may exercise his right "by giving notice to the carrier . . . . in whose possession the goods are" at such a time that by reasonable diligence the carrier may stop delivery to the buyer, which he ought to make according to his contract with the buyer: s. 46, sub-s. 1. Lord Hardwicke says (2) that if goods "are actually delivered to a carrier to be delivered to A. and while the carrier is upon the road, and before actual delivery to A. by the carrier, the consignor hears A. his consignee is likely to become a bankrupt, or is actually one, and countermands the delivery ,and get sthem back into his own possession again, I am of opinion that no action of trover would lie for the assignees of A. because the goods, while they were in transitu, might be so countermanded." And if such notice is given to the carrier "he must redeliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller": s. 46, sub-s. 2. In general practice the unpaid vendor is only too ready to get back the goods which he has sold to an insolvent consignee. It is clear that, to get them from the carrier, he must discharge any lien the carrier has for particular charges or freight on the goods in question, but not any general lien by contract or usage for other sums due from the consignee but not due in respect of the particular goods. This has recently been authoritatively restated by the House of Lords in *United States Steel Products Co.* v. *Great Western Ry. Co.* (3) I notice, to show I have not overlooked it, that the shipowners' lien for freight in the case now before us is not a common law lien for freight on delivery, but a contractual lien for advance freight, but it is in my view "charges payable on the carriage of the particular goods" within the decision of the House of Lords. (4) The unpaid vendor is usually quite ready to do this to get the goods; and it is not till, in this case, an unpaid vendor contents himself with the negative attitude: "do not deliver bills

(1) 1 Atk. 245, 250.
(2) 1 Atk. 245, 248.
(3) [1916] 1 A. C. 189.
(4) [1916] 1 A. C. 196.

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of lading or goods to the consignees under your contract," and declines to give any further instructions as to what is to be done with the goods at the end of the transit, that the question arises, what are the duties to the carrier of the unpaid vendor who stops in transitu—the Sale of Goods Act having only stated some of his rights against the carrier. It will be noted that the unpaid vendor goes further in this case: he not only says "Do not deliver to the consignee," and abstains from giving instructions to whom the carrier is to deliver, but he actually gets an undertaking from the consignee that he will not take delivery under his contract. (See letter of November 26.)

This raises the question what the unpaid vendor is bound or entitled to do when he "stops in transitu." May he during the transit, as of right, direct the carrier to deliver to him, before the contractual place of destination? Must he at the end of the transit take delivery, if he prevents delivery to the contractual consignee? Or can he say, as in this case, "Don't deliver to the consignee; I won't take the goods or tell you what to do with them; you must provide for the goods, but I shall sue you if you deliver to the consignee under your contract"? First, what is the effect on the transit or voyage under the contract of affreightment? The unpaid vendor may "stop," that is, retake possession by the carriers holding for him "in transitu," that is, during the transit; but he cannot, in my view, demand actual possession during the transit against the will of the carrier, or direct the shipowner to deliver to him except at the contractual place of destination. The goods may be under other goods in the hold; the ship may have contractual engagements to carry other goods to other parts; policies of insurance may be affected by detention or delay. The contract of sale is not cancelled by stoppage in transitu; neither, in my view, is the contract of affreightment, except in so far as delivery at the port of destination to the consignee is stopped by the unpaid vendor, and other delivery there is ordered by him. It is true that in *Whitehead* v. *Anderson* (1) Parke B. uses language like this: "The law is clearly settled, that the unpaid vendor has a right to *retake* the goods before they have arrived at the destination originally contemplated by the purchaser." But the same learned judge, in

(1) 9 M. & W. 518, 534.

*Wentworth* v. *Outhwaite* (1) in the same year, says: "The vendor is entitled to *retain* the part actually stopped in transitu till he is paid the price of the whole, but has no right to *retake* that which has arrived at its journey's end." He is either using "retain" and "retake" as equivalent words meaning "holding adverse possession," or is confining "retaking" to the journey's end. In the same way, when Dr. Lushington says in *The Tigress* (2) "The right to stop means the right not only to countermand delivery to the vendee, but to order delivery to the vendor," he is, I think, speaking of the place where the carrier by contract has to deliver. The carrier may, and it is frequently convenient that he should, redeliver, before the contract place of delivery, to the unpaid vendor on an indemnity; but he cannot, in my view, be forced to do it. The delivery of the goods may be stopped, but not their transit to the place of delivery.

The goods then arrive at the contract place of delivery where, if there had been no stop, they would have been delivered to the consignee, subject to the shipowner's lien for freight. If the shipowner exercises that lien against a demand by the consignee, he will have to bear the cost of exercising the lien—*Somes* v. *British Empire Shipping Co.* (3)—and provide for the safe custody of the goods while he keeps his hand on them; and he cannot sell the goods. But supposing he is told not to deliver to the consignee by an unpaid vendor who has the right to order delivery to himself and does not, on what principle can he be compelled to retain and provide for the custody of the goods after he has arrived at the contract place of destination, or is ready to go there, if any one will take delivery? What is he to do with the goods? Is his ship to go sailing round the world, like the "Flying Dutchman," on an endless, hopeless voyage for ever carrying goods that no one will take? Is his ship to stay at the port of destination till it is convenient to some one to take the goods from her? Why, if he discharges the goods, must he pay duties which by the contract should be paid by the person taking delivery, and provide for the custody of the goods, as here, for an uncertain time, on the chance that some one will some day recoup him? And does it make any difference, when he is stopped

(1) 10 M. & W. 436, 452. (2) 32 L. J. (P. M. & A.) 97, 102.
(3) (1860) 8 H. L. C. 338.

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by the unpaid vendor from tendering the goods to the consignee, that, if he had been permitted to tender them, he might have been in similar difficulties if he chose to assert his lien for freight? He is prevented from having the chance of offering the goods to the consignee.

It is said that both the shipowner for his freight and the unpaid vendor for his price have to look to the goods and must take their chance. This is not quite exact, as the unpaid vendor can sell the goods, and the shipowner cannot; but, further, the unpaid vendor is claiming to exercise his lien through the shipowner, and, if he must bear the expense of exercising his own lien, cannot make the shipowner bear the expense of exercising the vendor's lien for the benefit of the vendor. It is also suggested that the shipowner makes his contract subject to the possibility of an unpaid vendor stopping in transitu, and must put up with the consequences. But, if I am right that the unpaid vendor cannot stop the transit, but only the delivery to the vendee, it follows that he cannot prolong the transit or the shipowner's obligation to hold the goods after the shipowner is ready to make delivery at the end of the transit. This question must be considered, not only from the point of view of the shipowner's claim for freight for the transit, but from the point of view of his claim for demurrage or damages for detention at the end of the transit. Freight is now frequently paid in advance; but when the shipowner arrives at the end of the transit, and is forbidden by the unpaid vendor to deliver to the consignee, what is his position as to custody of the goods if the unpaid vendor refuses to give positive instructions as to their delivery? What is the shipowner to do? If he keeps the goods in his ship, ought not the person who compels him to do so to pay the demurrage? If he lands the goods in a warehouse to keep the unpaid vendor's lien, ought not the person for whom the lien is exercised to bear the expense of using the lien? And why is the shipowner to be compelled to take any responsibility for the goods after his contract voyage is over? Surely it is for the person who stops the transit and desires to exercise his lien to take the goods and exercise his lien for himself. And must he not, before he does so, satisfy any liens already existing?

Further, in my view, the shipowner has fulfilled his contract when

he has reached a point where the consignee or person taking delivery is bound to do something, and is not bound himself to incur further expense when no one will take delivery. He is not bound to go into a dock and incur dock dues if he is told that the consignee will not take delivery even if he goes in. He was not in this case bound to send the goods up from Tutoya, when no one would pay the duties without which the goods could not be landed, and he was not allowed by the vendor to deliver the goods to the contractual consignees.

On these events happening the shipowners had, in my view, no further obligation to provide for the goods. The unpaid vendors had the right to stop delivery to the consignees and the right to require delivery at the port of destination to themselves. In my view this imposed on them a corresponding duty to take delivery from the shipowners, if they continued to prevent them from delivering to the consignees. The vendors are not obliged to perform this duty, for they may release the goods and withdraw the stop before the end of the transit, but if they do not withdraw the stop, but insist on it, in my opinion they substitute themselves for the original consignees and must take delivery. They can only do so on the terms of discharging the shipowners' lien for freight, and, as these vendors are quite solvent, the damages for their failing to take delivery will be at least the amount of freight the shipowners would have received if the vendors had fulfilled their obligation and taken delivery. The question is, not what the shipowners have lost by being stopped from tendering to the consignees; it is quite possible in this case that they have lost nothing, as the consignees would not or could not pay, and expenses might be incurred in asserting the lien. The question is what the shipowners have lost by the vendors' refusing to take delivery at the end of the transit when they have stopped the contractual delivery. And if, as I have held, they were bound to take delivery in such a case, the shipowners have lost at least the amount of the freight which the vendors must have paid before they took delivery. It is not necessary to hold that the vendors become a party to the original contract; their obligation follows, in my view, from their interfering with that contract and persisting in their interference at the end of the transit.

It is true that this point has never been determined before, but the fact that unpaid vendors have in fact always acted in accordance

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with the obligation that I think is imposed on them shows that it is in accordance with commercial usage and in favour of commerce. On this part of the case the conclusion I have arrived at is apparently the same as that reached by Bailhache J., though, as he does not state his reasons, I do not know that we have travelled by the same road. But as I differ from him in the view I take of the documents in the case, and see nothing in those documents to destroy the vendors' obligation to take delivery at the end of the transit of the goods which they have stopped from going to their contractual destination, I am of opinion that the appeal should succeed and that judgment should be entered for the plaintiffs for 2743*l.* 14*s.* 7*d.* with costs here and below.

*Raeburn*, for respondents. There may be a question as to the amount for which judgment ought to be entered. The plaintiffs seem to have been held to be entitled to damages, and not to freight qua freight. The goods were stopped at Cajueiro and never went further. The evidence at the trial was that the cost of lightering from Cajueiro to Paranahyba was 12*s.* a ton, an expense which the shipowners have not incurred. If the plaintiffs are entitled to damages there would be some deduction, possibly the 12*s.* a ton.

LORD READING C.J. I do not think there is any difficulty. We considered this point, and we came to the conclusion that the plaintiffs were entitled to recover the whole of the freight. Each one of us has dealt with it on that basis, notwithstanding that the ship had not arrived at the destination.

Solicitors for appellants: *Armitage, Chapple & Macnaghten.*

Solicitors for respondents: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

F. E.

## LAW & BONAR, LIMITED *v.* BRITISH AMERICAN TOBACCO COMPANY, LIMITED.

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*July* 17, 18.

[1915 L. 1152.]

*Sale of Goods—C.i.f. Terms—Insurance against War Risk—Obligation on Seller to give Buyer Information to enable him to insure—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 32, *sub-s.* 3.

Sect. 32, sub-s. 3, of the Sale of Goods Act, 1893, provides that, "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit":—

*Held*, (1.) that the sub-section does not apply to a contract on c.i.f. terms entered into in time of peace, inasmuch as the contract itself provides for all the insurance that is contemplated or usual at the time when it is made; and (2.) that the sub-section does not impose any new obligation on the seller to give notice to the buyer so as to enable him to insure against war risks if, after the date of the contract, war becomes imminent.

ACTION tried by Rowlatt J. as a commercial cause.

By a contract made between the plaintiffs and the defendants on May 6 and 7, 1914, the defendants bought from the plaintiffs a quantity of Calcutta hessian at a price c.i.f. Smyrna to be shipped from Calcutta in time to arrive at Smyrna by September, 1914. The defendants stipulated by a clause in the contract that the goods were to be at the plaintiffs' risk until actual delivery to the defendants. In fulfilment of the contract the goods were shipped by the plaintiffs' correspondents in Calcutta on the British steamship *City of Winchester*, the bill of lading being dated July 20, 1914. The goods were insured by a policy containing the f. c. and s. clause. On August 4, 1914, war was declared between Great Britain and Germany, and on or about August 13, 1914, the *City of Winchester* was sunk by a German cruiser and the goods in question were lost. Neither the fact of the shipment of the goods on the *City of Winchester* nor the fact that that vessel was sunk on the date mentioned were known to the plaintiffs (whose business is in this country) till

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later. Meanwhile correspondence had passed between the plaintiffs and the defendants on the subject of the insurance of the goods. On July 31 the plaintiffs wrote to the defendants pointing out that war risk was not covered by the insurance under the contract, offering to negotiate such insurance for the defendants at the lowest current rates, and asking for instructions. On August 4 the defendants acknowledged the receipt of the plaintiffs' letter and asked to be advised as to the lowest rates obtainable for war risks, adding that they would give the matter their consideration and advise them accordingly. On August 5 the plaintiffs replied that it would be impossible to insure the goods, as in all probability they would be shipped by an Austrian Lloyd steamer, in which case war risk insurance would not be undertaken by English underwriters.

On August 8 the plaintiffs informed the defendants that they were still without definite advice from Calcutta as to the shipment of the goods, but stating that as the goods were for July shipment the defendants would be quite safe in assuming that they were now on their way, and that from their past experience of similar shipments the goods were almost certain to come forward by an Austrian Lloyd steamer. On August 21 the plaintiffs informed the defendants that they had now received advice from Calcutta that the goods had been shipped by the *City of Winchester*, adding that they gave this information in case the defendants desired to insure against war risk. On the afternoon of the same date the fact of the loss of the *City of Winchester* was reported in London. On August 24 the defendants wrote that as the *City of Winchester* had been sunk it was too late to effect an insurance on the goods and pointing out that the plaintiffs' Calcutta representatives ought to have cabled immediately the goods were shipped, mentioning the name of the steamer, date of sailing, &c. Further correspondence passed between the parties, and in the result the defendants refused to take up the shipping documents and pay for the goods.

The plaintiffs now sued to recover damages for breach of contract by the defendants in refusing to accept and pay for the goods. The defendants denied liability and counterclaimed damages. They alleged that by the letters which had passed between them the

plaintiffs became the agents of the defendants to take steps to insure the goods against war risks and that in breach of their duty they had failed to do so; and, further, that it was the plaintiffs' duty to notify the defendants at the earliest possible moment of the name of the steamer by which the goods had been shipped and that in breach of that duty they had failed to do so.

Evidence was given that between August 4 (the date of the outbreak of the war) and August 21, 1914, cargo in British vessels could be insured against war risks.

*Leslie Scott*, *K.C.*, and *Stuart Bevan*, for the plaintiffs. Under a contract on c.i.f. terms the seller is not concerned with insurance against war risks; it is for the buyer to insure against those risks if he desires to do so: *Groom* v. *Barber*. (1) The loss in this case, therefore, falls upon the defendants.

*Roche*, *K.C.*, and *Harold Smith*, for the defendants. (2) At the end of July and during August, 1914, circumstances had arisen which made it usual to insure against war risks; it was therefore the duty of the plaintiffs under s. 32, sub-s. 3, of the Sale of Goods Act, 1893, to give the defendants the information necessary to enable them to effect an insurance against war risks, and not having done so the defendants are not liable on the contract, but are entitled to recover for the loss they have sustained. [They referred to *Wimble* v. *Rosenberg* (3) and *Arnot* v. *Stewart*. (4)]

*Leslie Scott*, *K.C.*, in reply. In *Wimble* v. *Rosenberg* (5) in the Court below Bailhache J. expressed the opinion that the sub-section in question did not apply to a c.i.f. contract, and that view was not affected by the decision in the Court of Appeal. (3) Under such a contract the seller's duty is fulfilled when, as regards insurance, he takes out a policy containing the f. c. and s. clause. That certainly is his sole duty in reference to insurance in normal times. The sub-section has reference to the time when the contract is entered into, or, at latest, when the shipment is made. If there is then a general usage to insure against a particular risk it is the duty of the seller

(1) [1915] 1 K. B. 316.

(2) The argument is confined to the effect of s. 32, sub-s. 3, of the Sale of Goods Act, 1893, which is set out in the head-note.

(3) [1913] 3 K. B. 743.

(4) (1817) 5 Dow, 274.

(5) [1913] 1 K. B. 279, 282.

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to give information which will enable the buyer to effect the insurance, but the sub-section does not mean that, if at any later date an unforeseen contingency arises which would make it to the buyer's interest to effect some additional insurance which was not usual at the time the contract was entered into or the shipment made, the seller is under any duty to give information to the buyer. If it had been intended to impose such an obligation upon the buyer the sub-section would have said so in terms. In this case it cannot be said that at the date of the contract or at the date of the shipment it was usual to insure against war risks.

*Cur. adv. vult.*

July 18. ROWLATT J. Some points in this case, I think, are quite clear. In the first place, the tender of documents representing goods duly shipped in accordance with the contract and insured against marine risks as required by the contract was not vitiated by the fact that the goods had actually been lost. That is plain. Secondly, the printed clause at the end of the form used in this case stating that the goods are at seller's risk till actual delivery has no application to the present contract. The buyers paying c.i.f. terms were actually paying for the insurance against all contemplated risks from the moment of shipment. It seems to me that a term that, for a period after shipment, the goods were to be at the risk of the seller is repugnant to that, and the clause to that effect printed on the form used in this case is inapplicable to the transaction that actually was entered into.

The next question is whether s. 32, sub-s. 3, of the Sale of Goods Act, 1893, applies to this case. It clearly does not apply to a c.i.f. contract in times when no one contemplates war, and when, therefore, war is not being usually insured against. It does not apply because the contract c.i.f. provides for all the insurance that is contemplated or usual and the seller is to effect it. That was the nature of this contract when made. It dealt exhaustively and expressly with all the insurance that was in view. But now it is said that, on war becoming imminent, another form of insurance emerged and the contract ceased to be one which dealt exhaustively with the question of insurance and a new obligation arose for the seller. I cannot agree. This sub-section annexes a term

to the contract, and the question whether it is applicable or not falls to be decided as at the time when the contract is made. I say nothing as to whether the sub-section could apply to a contract c.i.f. made at a time when insurances other than those to be provided by the seller—e.g. against war risks—are usual. That point does not arise. In this case I do not think there is any real evidence that it was usual to insure against war risks at any material time. Even the buyers themselves in their letter of August 4, referring to the question of insurance against war risks, wrote that, if they were advised of the lowest rates, they would give the matter their consideration. I am not at all certain that they themselves had made up their minds whether they would insure against war risks or not. [His Lordship then dealt with the contention that there was an employment of the plaintiffs by the defendants to effect an insurance against war risks and held that there was no evidence of such an employment.]

In the result, the plaintiffs are entitled to judgment upon the claim and upon the counter-claim.

*Judgment for plaintiffs.*

Solicitors for plaintiffs: *Coward & Hawksley, Sons & Chance.*
Solicitor for defendants: *Joseph Hood.*

J. S. H.

1916
*May* 26.

## MITCHELL, COTTS & CO. *v.* STEEL BROTHERS & CO., LIMITED.

*Shipping—Charterparty—Shipper's Obligation to Shipowner—Shipment of Goods by Charterer not allowed to be discharged at Port of Destination without Permission of British Government—Knowledge of Charterer of Risk of Delay to Ship—Duty to communicate Facts to Shipowner ignorant of them—Refusal by British Government of Permission to discharge—Liability of Charterer to Shipowner.*

Whatever may be the full extent of the obligation upon a shipper of goods, it amounts at least to an undertaking by him that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the shipowner facts which are within his knowledge indicating that there is the risk, provided that the shipowner does not and could not reasonably know those facts.

The shippers of a cargo of rice upon a vessel they had chartered for a voyage to Piræus knew that the rice could not be discharged there without the permission of the British Government, although they thought that they might obtain the permission. In fact they were unable to procure it, and the ship was in consequence delayed. The shipowner did not and could not reasonably have known that the permission was necessary:—

*Held*, that the delay arose from a breach by the charterers of their obligation to the shipowners, and that therefore the shipowners had a cause of action against them in respect of the delay so caused.

Judgment of Crompton J. in *Brass* v. *Maitland* (1856) 26 L. J. (Q.B.) 49, 57, followed.

AWARD AND FURTHER AWARD stated by an umpire in the form of a special case.

By a charterparty dated March 29, 1915, and made between Mitchell, Cotts & Co., of London, therein described as the time chartered owners of the steamship *Kaijo Maru* (hereinafter called "the owners"), and Steel Brothers & Co., Limited, of London, therein described as merchants (hereinafter called "the charterers"), the owners agreed to let and the charterers to hire the steamship *Kaijo Maru* for a voyage from Bassein to Alexandria for the carriage of a cargo of rice at the rate of 70*s.* per ton of 1016 kilos and upon the terms and conditions therein contained, one of which was

that the steamer was "to be discharged as customary for steamers at port of destination." Fifteen days' demurrage over and above the stipulated laying days were to be allowed the charterers, to be paid for at the rate of 4*d.* per ton net register per day (running), payable day by day.

The *Kaijo Maru* was duly loaded under the charterparty with a cargo of rice at Bassein and proceeded therewith on April 18, 1915, to Alexandria. Shortly before April 28, while the *Kaijo Maru* was on passage to Alexandria, the charterers approached the owners with a view to ascertaining upon what terms the owners would consent to the ship being sent to Piræus instead of Alexandria, and negotiations thereupon took place as a result of which on April 30 it was agreed that the charterparty should be varied by changing the destination of the ship from Alexandria to Piræus, and on May 6 cable instructions were sent by the owners to the captain to proceed to Piræus in accordance with the arrangements they had made with the charterers, and on the arrival of the ship at Suez on May 10 these instructions were handed to the master.

Whilst the charterers were endeavouring to obtain the consent of the Government authorities to the change in the destination of the ship she was detained at Port Said. On May 29 the Foreign Office wrote to the charterers saying that they could not consent to allow the *Kaijo Maru* to proceed to Piræus, and on May 30 the charterers' agents at Port Said cabled the charterers that the naval authorities had directed the *Kaijo Maru* to proceed to Alexandria to discharge cargo, and thereupon the charterers cabled their agents to order the *Kaijo Maru* to Alexandria and to discharge her cargo there.

On May 31 the charterers, in reply to a letter from the owners, stated that they were not prepared to pay freight other than that for charter and referred the owners to His Majesty's Government for any claim they might have for detention at Port Said.

On May 31, at the request of the charterers and without prejudice, the owners telegraphed the captain of the *Kaijo Maru* to hold the cargo of rice to the order of the Anglo-Egyptian Bank, Alexandria, at which port the cargo was ultimately discharged.

Subject to the opinion of the Court the umpire awarded that the charterers should pay the owners as damages in respect of the

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detention of the steamer at Port Said the sum of 1000*l.* He found as facts :—

(1.) That the steamship *Kaijo Maru* was detained at Port Said for twenty-two days.

(2.) That the detention was wholly due to the fact that the charterers had not obtained, and did not obtain, the permission of the Government authorities to the destination of the ship and cargo being changed to Piræus.

(3.) That when negotiating with the owners with regard to altering the destination of the ship to Piræus the charterers were aware of the fact that before they could send the ship to that destination with the cargo on board a permission from the Government authorities was necessary, but they did not communicate this to the owners.

(4.) The charterers were aware on or about May 14, 1915, that the required permission would not be granted.

The question for the opinion of the Court was whether the charterers were liable to pay the owners damages for the detention of the *Kaijo Maru* at Port Said.

The award having been remitted to the umpire in order that he might find whether the owners knew, or reasonably might have known, that a permission from the Government authority was necessary, the umpire found that the owners had no knowledge, and might not reasonably have known, that permission from the Government authority was necessary to discharge the cargo at Piræus.

*Roche, K.C.*, and *Raeburn*, for the owners. The umpire was right in awarding damages. Piræus was a closed port to the rice, and the cargo was therefore a prohibited one. As Piræus was an impossible port, the charterers ought not to have attempted to send the ship there, and their action in doing so was contrary to their duty under the charterparty. The principles laid down by Crompton J. in his judgment in *Brass* v. *Maitland* (1) govern the present case. [*Dunn* v. *Bucknall Brothers* (2) was also referred to.]

*Leslie Scott, K.C.*, and *R. A. Wright*, for the charterers. The owners have made out no case for damages. No freight became

(1) 26 L. J. (Q.B.) 49, 57. (2) [1902] 2 K. B. 614.

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payable until the arrival of the ship at Piræus. No question of damages arises. Any detention of the ship was for the account of the shipowners. The charterers considered that obtaining a licence from the Government to enable the ship to go to Piræus was a mere form, and that no serious difficulty would arise. It is a fallacy to say that in the circumstances the cargo of rice came within the category of dangerous goods. In *Brass* v. *Maitland* (1) the charterers knew that the goods were of a dangerous character and the shipowner did not. The award made by the umpire falls short of stating facts sufficient to fix the charterers with liability, because it does not state that the danger of the licence being refused by the Government was or ought to have been present to the minds of the charterers. The licence would have been granted almost as a matter of course in normal times, and it was refused in consequence of the alteration in the policy of the Government. *Greenshields, Cowie & Co.* v. *Stephens & Sons* (2) is in favour of the charterers.

ATKIN J., having stated the facts, continued: On behalf of the owners it was contended that, as it was known to the charterers that they could not send the ship to Piræus with a cargo of rice without the consent of the Government, and that the changing of the destination of the ship to Piræus was likely to cause detention of the ship, this case is analogous to one of shipping dangerous goods. I was referred to *Brass* v. *Maitland* (1), where the majority of the Court seem to have laid down that there is an absolute obligation on a shipper to make good damage caused by a shipment of dangerous goods. Crompton J., however, delivered a judgment in which he took a narrower view of the duty of the shipowner and which is stated in Carver on Carriage by Sea, 5th ed., s. 278, to be more in accordance with the later authorities. I agree with that view. Crompton J. said (3): "Suppose, for instance, that a shipment was made of goods for a foreign port, to which, according to the information known at the shipping port, such consignments might be properly and safely made, but that by some recent law the foreign country has made such shipment illegal, would the shipper be liable in such case? I entertain great doubt whether either the duty or

(1) 26 L. J. (Q.B.) 49. (2) [1908] A. C. 431.
(3) 26 L. J. (Q.B.) 57.

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the warranty extends beyond the cases where the shipper has knowledge, or means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger which he had the means of knowing, and ought to have communicated. Probably an engagement or duty may be implied, that the shipper will use and take due and proper care and diligence not to deliver goods apparently safe, but really dangerous, without giving notice thereof, and any want of care in the course of the shipment in not communicating what he ought to communicate might be negligence for which he would be liable ; but where no negligence is alleged, or where the plea negatives any alleged negligence, I doubt extremely whether any right of action can exist." I think there is no question that a shipment of goods upon an illegal voyage—i.e., upon a voyage that cannot be performed without the violation of the law of the land of the place to which the goods are to be carried—a shipment of goods which might involve the ship in danger of forfeiture or delay —is precisely analogous to the shipment of a dangerous cargo which might cause the destruction of the ship. I do not think there is any distinction between the two cases.

Whatever may be the full extent of the shipper's obligations, it appears to me that it amounts at least to this, that he undertakes that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the owner facts which are within his knowledge indicating that there is such risk, if the owner does not and could not reasonably know those facts. I think that is placing the obligation of the shipper within very moderate limits, and it may be considerably wider. I take the finding of the arbitrator to be that the charterers knew at the time they made the contract of affreightment that the goods could not be discharged at Piræus without permission from the British Government, although they thought they might obtain permission from the Government to do so. In other words, they knew that the destination was an illegal one because the British Government would not allow the goods to go through unless special permission was obtained. That permission the charterers did not procure.

The umpire found that the charterers knew that fact but that the shipowners did not and could not reasonably have known it. In

these circumstances it follows on the findings of the umpire that the delay arose from a breach by the charterers of their obligation in the sense I have indicated.

In my judgment, therefore, the shipowners have a cause of action against the charterers in respect of the delay so caused, and the award of the arbitrator must stand.

*Award upheld.*

Solicitors for owners : *Botterell & Roche.*

Solicitors for charterers : *Waltons & Co.*

J. E. A.

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## POWELL *v.* GELSTON.

[1916 P. 15.]



*Defamation—Libel—Publication—Letter addressed to one Person opened by another.*

One H. W. P., who contemplated purchasing a house from the plaintiff, requested his son F. W. P., with whom he was staying for a few days, to write to the defendant to make certain inquiries respecting the plaintiff. F. W. P. wrote in his own name and from his own address asking for the information in confidence. The defendant replied by a letter which arrived at F. W. P.'s house during his absence ; it was opened and read by H. W. P. and was not seen or read by F. W. P. In an action by the plaintiff against the defendant in respect of alleged libellous statements in his letter the jury found that the defendant did not know or expect that his letter might probably be opened or seen by a person other than the addressee ; that the defendant did not bona fide believe that what he wrote was true ; that the defendant was actuated by malice in writing the letter ; and they assessed the damages at 75*l.* :—

*Held,* that judgment must be entered for the defendant as there had been no publication of the libel by him.

FURTHER CONSIDERATION by Bray J. of action tried at Reading.

The plaintiff sued to recover damages for libel and slander, but no question arose on this argument as to the slander. In 1915 the plaintiff advertised his house for sale. The advertisement was answered by one H. W. Pollard, who contemplated purchasing the house, and who requested his son F. W. Pollard, with whom he was staying for a few days, to write to the defendant to make certain inquiries respecting the plaintiff. The son did so on October 9,

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writing in his own name and from his own address, asking for the information in confidence, and promising not to let the plaintiff know that the defendant had written. In reply the defendant wrote a letter dated October 11 containing statements which the plaintiff alleged to be defamatory of his character. That letter arrived at F. W. Pollard's house during his absence and was opened and read by H. W. Pollard. It was not seen or read by F. W. Pollard. At the trial certain questions were left to the jury, which with their answers were as follows: "Did the defendant know or expect that the letter might probably be opened or seen by a third person other than the person to whom it was addressed?—No. Did the defendant bona fide believe what he wrote was true?—No. Was the defendant actuated by malice in writing the letter?—Yes. Did the plaintiff instigate Pollard to write the letter?—No. Damages, if any?—75*l*."

*J. B. Matthews, K.C.* and *Ernest Walsh*, for the plaintiff. In *Rex* v. *Burdett* (1) it was decided that the offence of libel is complete as regards publication when the libellous document is put into the post office. As Best J. there said (2), "The moment a man delivers a libel from his hands his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus pœnitentiæ, his offence is complete, all that depends upon him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act." So also it was held in *Rex* v. *Amphlit* (3) that the delivery of a newspaper to the officer at the stamp office was a sufficient publication to sustain an indictment for a libel in that paper. In criminal law there is publication of a libel although it is seen only by the person libelled, but in an action for libel it is necessary to prove publication to some one other than the plaintiff. In this case there was a publication to satisfy that requirement. The defendant intended that his letter should be opened and read by some one other than the plaintiff. To apply Best J.'s language, the defendant shot his arrow, and it did not depend upon him whether it hit the mark or not. In *Thorley* v. *Lord Kerry* (4) the

(1) (1820) 4 B. & Al. 95.
(2) Ibid. 126.
(3) (1825) 4 B. & C. 35.
(4) (1812) 4 Taunt. 355, 358.

judge at the trial must have considered that handing a letter unsealed to a servant to carry was a publication where the servant opened and read the letter. The judgment of the Exchequer Chamber in that case affords no assistance, as it dealt with another point. *Clutterbuck* v. *Chaffers* (1) suggests that there is publication if the servant to whom a libellous letter is delivered unsealed reads it. In *Pullman* v. *Hill & Co.* (2) Lord Esher M.R. said that "publication" means "the making known the defamatory matter after it has been written to some person other than the person of whom it is written." *Huth* v. *Huth* (3) decided that where the alleged defamatory letter, which had been sent through the post in an unclosed envelope, was taken out of the envelope and read by a butler at the addressee's house, in breach of his duty and out of curiosity, there was no publication for which the defendant was liable. There, as Bray J. pointed out (4), the opening of the envelope and the reading of its contents was a wrongful act by the butler. Here there was no wrongful act by H. W. Pollard in opening and reading the letter.

[BRAY J. Is not the defendant responsible only for the act he intended, namely, that the letter should be opened and read by the addressee?]

It is sufficient that he intended that the letter should be opened by some one other than the plaintiff.

*F. W. Sherwood*, for the defendant. An inadvertent or accidental publication is no publication: per Lord Kenyon in *Rex* v. *Lord Abingdon* (5); *Emmens* v. *Pottle* (6); *Reg.* v. *Munslow.* (7) *Boxsius* v. *Goblet Frères* (8) and *Edmondson* v. *Birch & Co.* (9) proceed upon the same footing. In *Sharp* v. *Skues* (10) it was held that there had been no publication where the jury found that the defendant had no reason to think that his letter would be opened by any one other than the addressee.

[BRAY J. In that case there was no publication intended, because the letter was addressed to the person alleged to have been defamed. Here the letter was addressed, not to the plaintiff, but to a third person.]

(1) (1816) 1 Stark. 471.
(2) [1891] 1 Q. B. 524, 527.
(3) [1915] 3 K. B. 32.
(4) Ibid. 46.
(5) (1794) 1 Esp. 226, 228.
(6) (1885) 16 Q. B. D. 354.
(7) [1895] 1 Q. B. 758, 765.
(8) [1894] 1 Q. B. 842.
(9) [1907] 1 K. B. 371.
(10) (1909) 25 Times L. R. 336.

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To constitute publication in law there must be a publication to the person intended, unless, indeed, the defendant by his own carelessness allows the letter to get into the hands of another person, or unless he knows or has reason to expect that the letter may be opened by some one other than the addressee: see *Gomersall* v. *Davies*. (1) [He also referred to *Warren* v. *Warren* (2) and *Hebditch* v. *MacIlwaine*. (3)]

*J. B. Matthews, K.C.*, in reply. In the cases cited for the defendant there was no intention to publish the libel to any one, the letter containing the defamatory matter being addressed to the person defamed. [He cited *Delacroix* v. *Thevenot*. (4)]

*Cur. adv. vult.*

July 27. BRAY J. read the following judgment:—This action was brought to recover damages in respect of four slanders and one libel. The jury found for the plaintiff on three of the slanders and assessed the damages in respect of those at 15*l*., 20*l*., and 5*l*., making in all 40*l*. They found for the defendant on the fourth slander. No question arises now as to the slanders. It was admitted for the purpose of the argument before me that the plaintiff was entitled to judgment for 40*l*. in respect of the slanders. Upon the libel they found for the plaintiff damages 75*l*. subject to one finding. The defendant contended that there had been no publication of the libel, and to enable me to decide that point I put this question to the jury: Did the defendant know or expect that the letter might probably be opened or seen by a third person other than the person to whom it was addressed? The jury answered "No."

The facts relating to publication were not in dispute. Some time in June or July, 1915, the plaintiff advertised his house, called Beech House, for sale. H. W. Pollard, the father of F. W. Pollard, answered the advertisement. In the month of October F. W. Pollard the son wrote the letter of October 9. That letter was written by him on the request of his father, who happened to be staying with him for the week end. It was signed by the son in his own name. In answer to this the defendant wrote the letter of October 11, being the alleged libel. He directed it to F. W.

(1) (1898) 14 Times L. R. 430.
(2) (1834) 1 C. M. & R. 250.
(3) [1894] 2 Q. B. 54.
(4) (1817) 2 Stark. 63.

Pollard, Nursery Cottage, North Wanborough, the son's address. The letter duly arrived. It was opened by the father in his son's absence. It never was seen by the son at all. F. W. Pollard is a carpenter at North Wanborough and his father keeps a fish shop at Farnborough. Neither of them was known to the defendant. The son kept no clerk, and no evidence was given to show that the defendant when he wrote the letter of October 11 knew anything about the father having requested his son to write the letter or to show in any way that the defendant knew that the letter would be likely to be opened by the father or by any one other than the son.

On these facts the defendant submitted that there had been no publication of the libel. It was admitted that there was no publication to the son, and it was said that the defendant was not responsible for the publication to the father. Such a publication, it was argued, was not authorized by him expressly or impliedly, nor intended by him. This was the question I had to decide. I left the question to the jury, which they answered in the negative, but in fact I think there was no evidence which would have justified the answer "Yes." There is no doubt that to give a cause of action there must be a publication by the defendant. That is the foundation of the action, and publication to the plaintiff is no publication. For the plaintiff it was contended that the defendant intended that the letter should be published to some one, and it was immaterial whether it was to the father or the son. I do not think it is immaterial. The consequences and the damages may be very different. If published to A., it may cause very little damage to the plaintiff. If published to B., the consequences may be much more serious. Several cases were cited—*Delacroix* v. *Thevenot* (1), *Gomersall* v. *Davies* (2), and *Sharp* v. *Skues*. (3) They show that where to the defendant's knowledge a letter is likely to be opened by a clerk of the person to whom it is addressed the defendant is responsible for the publication to that clerk. As Lord Ellenborough said in *Delacroix* v. *Thevenot* (1), it must be taken that such a publication was intended by the defendant. On the other hand, in *Sharp* v. *Skues* (3) Cozens-Hardy M.R. said: "It would be a publication if the defendant intended the letter to be opened by a

(1) 2 Stark. 63. (2) 14 Times L. R. 430.
(3) 25 Times L. R. 336, 337.

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clerk or some third person not the plaintiff, or if to the defendant's knowledge it would be opened by a clerk; but the jury had negatived this in the clearest terms, and under these circumstances it was impossible to hold that some act done by a partner or a clerk of the plaintiff by his direction and for his own convenience when absent from the office could be a publication." Some cases of criminal libel were cited, but in my opinion they have no application. In this case the defendant was asked by the son to answer the questions in confidence, and the son promised that he would not let the plaintiff know that the defendant had written. The son was asking for an answer that he and he alone would see. The answer of the defendant was intended for the son alone.

Under these circumstances I cannot hold that the defendant was responsible for the publication to the father. There was therefore no publication of the libel, and the verdict and judgment on this part of the claim must be entered for the defendant.

*Judgment for defendant.*

Solicitors for plaintiff: *Andrew Walsh & Gray, Reading.*
Solicitors for defendant: *Lamb, Brooks & Co., Reading.*

J. S. H.

[COURT OF CRIMINAL APPEAL.]

1916
*July* 4.

## THE KING *v.* BANKS.

*Criminal Law—Carnal Knowledge of Girl between Thirteen and Sixteen Years of Age—"Reasonable cause to believe" Girl Sixteen Years of Age—Duty of Counsel in Conduct of Prosecution—Criminal Law Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 69), *s.* 5.

By s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885, any person who unlawfully carnally knows any girl of or above the age of thirteen and under the age of sixteen years is guilty of a misdemeanour. By sub-s. 2 it is provided that it shall be a sufficient defence to a charge under sub-s. 1 that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years :—

*Held*, that in order to constitute a defence under sub-s. 2 the person charged must have reasonable cause to believe, and must in fact believe, that the girl was at least sixteen years of age.

Observations as to the duty of counsel for the prosecution at a criminal trial.

APPEAL by the prisoner against his conviction.

The prisoner was convicted on June 9, 1916, before Bray J. at the Worcester Assizes of having unlawful carnal knowledge of a girl of the age of fourteen years. At the trial the prisoner, who gave evidence, did not dispute that he had had connection with the girl, the only defence being that he "had reasonable cause to believe that the girl was of or above the age of sixteen years" within the meaning of s. 5, sub-s. 2, of the Criminal Law Amendment Act, 1885. (1) He said that he had no idea that the girl was under the age of sixteen and that he did not think about her age at all, but that she had the appearance of a girl of seventeen.

(1) By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5, sub-s. 1, any person who unlawfully and carnally knows any girl being of or above the age of thirteen years and under the age of sixteen years shall be guilty of a misdemeanour.

By a proviso contained in sub-s. 2, "it shall be a sufficient defence to any charge under subsection one of this section if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years."

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During his address to the jury counsel for the prosecution exhorted them "to protect young girls from men like the prisoner."

The jury returned a verdict of guilty.

The prisoner appealed.

*S. R. C. Bosanquet*, for the appellant. If the appellant had reasonable cause to believe that the girl was of the age of sixteen he was entitled to an acquittal under s. 5, sub-s. 2, of the Criminal Law Amendment Act, 1885. It is not necessary that he should have in fact believed that she was of that age.

Counsel for the prosecution ought not to have given the exhortation to the jury. There is a growing tendency on the part of counsel for the prosecution to conduct cases as advocates rather than as ministers of justice. Counsel ought not to struggle to obtain a verdict: *Reg.* v. *Rudland* (1); *Reg.* v. *Puddick.* (2)

The appellant was seriously prejudiced at his trial by the appeal made by counsel for the prosecution to the jury to protect young girls from men like the appellant. It was exactly the kind of observation which Crompton J. in *Reg.* v. *Rudland* (1) said ought not to be made. [Other points were taken, but they are not considered of sufficient importance to call for a report.]

*F. J. Tucker* (*Cotes-Preedy* with him), for the Crown, was not called upon.

The judgment of the COURT (Ridley, Avory, and Atkin JJ.) was delivered by

AVORY J. In this case the only defence relied upon at the trial was that the appellant had, within the meaning of the proviso to s. 5, sub-s. 2, of the Criminal Law Amendment Act, 1885, reasonable cause to believe that the prosecutrix was of or above the age of sixteen years. In our judgment the phrase "had reasonable cause to believe" means "had reasonable cause to believe, and did in fact believe," i.e., that the person charged believed on reasonable grounds that the girl was at least sixteen years of age.

On behalf of the appellant a point taken was that at the trial counsel for the prosecution made a number of observations calculated to prejudice the jury, and in particular appealed to them to

(1) (1865) 4 F. & F. 495, 496. (2) (1865) 4 F. & F. 497, 499.

"protect young girls from men like the prisoner." That criticism of the manner in which the prosecution was conducted is one rather addressed to a matter of taste than to an actual irregularity in the proceedings. It is true that prosecuting counsel ought not to press for a conviction. In the words of Crompton J. in *Reg.* v. *Puddick* (1), they should "regard themselves" rather "as ministers of justice" assisting in its administration than as advocates. The observation complained of may not have been in good taste or strictly in accordance with the character which prosecuting counsel should always bear in mind. But it is impossible to hold that the jury were misled by it into finding the appellant guilty. In our judgment the jury would not have found the appellant guilty unless they had been satisfied of his guilt by the evidence. The appeal must therefore be dismissed.

*Appeal dismissed.*

Solicitor for appellant: *T. A. Matthews, Hereford.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) 4 F. & F. 497, 499.

J. E. A.

1915
*April 27.*

## ST. ENOCH SHIPPING COMPANY, LIMITED *v.* PHOSPHATE MINING COMPANY.

[1914 S. 3992.]

*Contract—Impossibility of Performance—Supervening Illegality—Part Performance — Quantum meruit — Shipping — Carriage by Sea — Restraint of Princes—Discharge at intermediate Port—Freight pro rata itineris.*

Owners of a British ship agreed to carry goods from Tampa in Florida to Hamburg. On August 3, 1914, the ship sighted the Lizard and was warned by the Admiralty to take the goods to an English port. On the following day war was declared between the United Kingdom and the Empire of Germany, and the further prosecution of the voyage to Hamburg became illegal and impossible. The cargo was discharged at Runcorn and deposited with warehousemen subject to a lien for freight claimed by the shipowners. The owners of the cargo discharged the lien, and took the goods protesting that no freight was due and never having assented to any alteration of the terms of the contract of carriage:—

*Held*, that the shipowners were not entitled to the freight, either in whole, since they had not completed the voyage, or in part, since no new contract between them and the owners of the cargo to give and take delivery at Runcorn instead of at Hamburg could be inferred.

*The Teutonia* (1871) L. R. 3 A. & E. 394; (1872) L. R. 4 P. C. 171 distinguished.

Trial of action before Rowlatt J. without a jury.

The plaintiffs were shipowners. They claimed a declaration that they were entitled to freight as against the defendants, who were owners of cargo, in the following circumstances.

By a charterparty dated November 11, 1913, the plaintiffs chartered the British ship *St. Helena* to the Ganz Steamship Line, of New York. The charterparty contained an exception of arrests and restraints of princes, rulers, and people, and the plaintiffs were under its terms entitled to a lien for freight.

The defendants had a freight contract with the Ganz Steamship Line. Under this contract they shipped a quantity of phosphate rock on board the *St. Helena* at Tampa, Florida, in the United States, under a bill of lading dated July 3, 1914, making the goods deliverable at the port of Hamburg to the order of the shippers on

payment of freight as agreed between themselves and the Ganz Steamship Line. The bill of lading was subject to the conditions and exceptions contained in the charterparty, including those of arrests and restraints of princes, rulers, and people.

On August 3, 1914, the ship arrived off the Lizard. She was there warned by the Admiralty that it would be advisable for her to discharge her cargo, which consisted of grain and cotton as well as of the defendants' phosphate rock, at some port in the United Kingdom. On August 4 war was declared between the United Kingdom and the Empire of Germany, and the further prosecution of the voyage to Hamburg became illegal and impossible. The grain and cotton were discharged at Manchester and the defendants' phosphate at Runcorn, and both were arrested by the Marshal of the Admiralty. The defendants as subjects of a neutral State established their right to the phosphate. The plaintiffs demanded possession, insisting on their alleged lien for freight. The phosphate was released to the plaintiffs and deposited by them with the Manchester Ship Canal Company subject to the lien for freight. The defendants discharged the lien, and took the goods protesting that no freight was due and never having assented to any alteration of the terms of their bill of lading.

The plaintiffs brought this action claiming that they were entitled to the full freight or, alternatively, to freight pro rata itineris.

*Leck, K.C.*, and *Raeburn*, for the plaintiffs. The defendants having accepted delivery at Runcorn, the plaintiffs are entitled to the full freight: *The Teutonia.* (1) The contract for carriage to Hamburg has not been frustrated through a disaster, but has become impossible of performance and is dissolved by the act of the law itself. The plaintiffs are therefore entitled to the full freight: *The Racehorse* (2); *O'Neill* v. *Armstrong, Mitchell & Co.* (3); or at least to freight pro rata itineris as upon a quantum meruit.

*Adair Roche, K.C.*, and *E. W. Brightman*, for the defendants. The full freight cannot be recovered because the contract of carriage has not been performed. Freight pro rata itineris can only be claimed under some agreement express or implied that a new or

(1) L. R. 3 A. & E. 394; L. R. 4 P. C. 171.

(2) (1800) 3 C. Rob. 101.

(3) [1895] 2 Q. B. 70, 418.

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altered voyage shall be substituted for the original voyage: *Hunter* v. *Prinsep* (1); *Vlierboom* v. *Chapman* (2); *The Newport* (3); *Hopper* v. *Burness* (4); *Metcalfe* v. *Britannia Ironworks Co.* (5); *Castel* v. *Trechman* (6); Carver on Carriage by Sea, 5th ed., s. 560. No contract can be inferred from the mere fact that the defendants took their goods where they found them. When performance of a contract becomes impossible the loss lies where it falls: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (7) In this respect there is no difference where the impossibility arises because further performance is illegal: *Esposito* v. *Bowden* (8); or because it is prevented by an accident: *Appleby* v. *Myers* (9); whether it be by perils of the sea, or by capture: *Embiricos* v. *Sydney Reid & Co.* (10)

ROWLATT J. The plaintiffs claim that the full freight, or alternatively freight pro rata itineris, is recoverable. First, as to the full freight. Freight is a sum to be paid on completion of the transit on which it is charged. If the transit is not completed, prima facie the freight never becomes payable. It is said that in the circumstances of this case the full freight is payable on the principle of *The Teutonia* (11) on the ground that the ship not being able to go to Hamburg has carried the cargo to a port relatively near. *The Teutonia* (11), as decided in the Privy Council, proceeded on lines which throw no light whatever upon this case. The consignee had a choice among a number of ports to any one of which he might order the ship. Dunkirk was one of these; Dover was another. He had ordered the ship to Dunkirk, but, war breaking out, it became impossible and unsafe to go to Dunkirk. The captain, acting as a reasonable man, went to Dover, and there the consignee took the cargo, never having asked the master to go anywhere else. The decision was simply this, that, having named a port which had become impossible, and having accepted delivery at the nearest alternative port named in the charterparty, the con-

(1) (1808) 10 East, 378, 394.
(2) (1844) 13 M. & W. 230.
(3) (1858) Swab. 335.
(4) (1876) 1 C. P. D. 137.
(5) (1877) 2 Q. B. D. 423.
(6) (1884) Cab. & E. 276.
(7) [1903] 2 K. B. 756.
(8) (1857) 7 E. & B. 763.
(9) (1867) L. R. 2 C. P. 651.
(10) [1914] 3 K. B. 45.
(11) L. R. 3 A. & E. 394; L. R. 4 P. C. 171.

signees ought to pay freight to that port. They could not insist on the ship going to an impossible port. If they had wanted her to go to any other possible port they ought to have ordered her to that port, but as they never did so the captain was performing his contract when he went to the nearest alternative port which was practicable. That case differs in all material points from the present. Here there was no alternative port, but only one port, namely, Hamburg. Moreover, that case is no authority that the full freight to Dunkirk could be recovered, unless it happened by accident that the freight to Dover and the freight to Dunkirk were the same. The freight recovered was freight to Dover, and not freight to Dunkirk eo nomine.

Secondly it was argued that carriage to Hamburg was dispensed with; that capture of the cargo was what prevented the further progress of the voyage, and that the shipowners ought not to be prejudiced by what was the fault of the cargo; and certain cases were cited where ship and cargo had been captured and the ship was released before the cargo. But in the present case the phosphate was absolutely prevented from arriving at Hamburg, not by any temporary seizure due to a misapprehension, but from events which happened long before that making the completion of the voyage once for all illegal and impossible.

Then as to the claim for freight pro rata itineris. There can be no freight pro rata unless there is a new contract express or implied to substitute the carriage which has been effected for the carriage originally contracted for. In *Hopper* v. *Burness* (1) Brett J. said: "What, then, is the principle governing the question whether such freight is payable? It is only payable when there is a mutual agreement between the charterer or shipper and the captain or shipowner, whereby the latter being able and willing to carry on the cargo to the port of destination, but the former desiring to have the goods delivered to him at some intermediate port, it is agreed that they shall be so delivered, and the law then implies a contract to pay freight pro rata itineris." That is a rule clearly stated of what is not only shipping law, but the general law, where there is an agreement between two parties that a thing shall be done but no agreement as to the price to be paid for doing it. Parke B.

(1) 1 C. P. D. 137, 140.

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in *Vlierboom* v. *Chapman* (1) laid down the law to the same effect: "To justify a claim for pro rata freight, there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference, that the further carriage of the goods was intentionally dispensed with." The consignee must accept the goods in such a way as to imply that he and the shipowner agree that the goods have been carried far enough and that the shorter transit shall be substituted for that named in the original contract. There is nothing to the contrary in *O'Neill* v. *Armstrong, Mitchell & Co.* (2) There the plaintiff, a seaman, having served as far as Aden on a voyage to Yokohama, refused to go further as war had broken out between Japan and China. Charles J., delivering the judgment of the King's Bench Division, said (3): "He"—i.e., the captain—"took the benefit of part performance, and there is evidence that at Aden he treated the run as at an end. Both sides seem to have regarded the original contract as one which could no longer be acted upon; and, that being so, we see no reason why for the work actually done the plaintiff could not have sued on a quantum meruit." That is to say, the shipowners had said that they could not go any further and the seaman said that he did not want to go any further. There is no new principle to be discovered in that case. In the present case the defendants, who were consignees, merely took their own goods when they were landed. No agreement to modify the contract of carriage can be inferred from that act. Mr. Leck contended that this was a different case from one where the voyage comes to an end through a disaster; that here the contract having become illegal is dissolved, and that therefore what was done must be paid for as on a quantum meruit. No authority was cited to support this contention. It is quite contrary to principle. To recover on a quantum meruit it is necessary to show a contract. When the amount to be paid is left in doubt it is measured by the merits of the services rendered; but there must be services expressly or impliedly asked for and to be paid for or agreed to be rendered and paid for. If a contract once made becomes legally impossible of performance, then in the absence of some new agreement the parties remain in the circumstances in which they find themselves. There

(1) 13 M. & W. 230, 238. (2) [1895] 2 Q. B. 70, 418.
(3) [1895] 2 Q. B. 77.

is no new obligation upon one party to pay money to the other unless there is some contract to that effect. In the present case there is no ground on which to support the plaintiffs' claim. There must therefore be judgment for the defendants.

*Judgment for defendants.*

Solicitors for plaintiffs : *Lowless & Co.*
Solicitors for defendants : *William A. Crump & Son.*

W. H. G.

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## COXE *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED.

1916
*July* 12, 13.

[1915 C. 2884.]

*Insurance (Life)—Exception in Policy—Death "directly or indirectly" caused by War—Death caused by Accident happening while Assured discharging Military Duties.*

By a policy of insurance the deceased, a military officer, was insured with the defendants against death caused accidentally within the United Kingdom by violence due to any external and visible means. The policy was subject to the condition that it did not insure against death "directly or indirectly caused by, arising from, or traceable to . . . . war." The realm being in a state of war, it became necessary to protect the South Eastern Railway, and whilst the deceased, in the course of his military duty, was walking alongside the rails of the railway for the purpose of visiting guards and sentries posted at various points along the line, he was accidentally killed by a train. The general public had no right to walk along the line at the place where the accident happened, and in normal times the place would have been illuminated by lights from an adjacent signal-box, but those lights had been obscured in compliance with regulations made under the Defence of the Realm Act, 1914. An arbitrator having found that the death of the deceased was traceable to war within the meaning of the condition :—

*Held*, that the finding of the arbitrator must be confirmed, inasmuch as the words "directly or indirectly" could not be reconciled with the maxim causa proxima non remota spectatur, which would have been applicable had the words not been in the condition ; and that, the deceased having been placed in a position

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of special danger by reason of his military duties consequent upon the war, it was open to the arbitrator to find as a fact that the death was indirectly caused by war.

AWARD made by an arbitrator in the form of a special case.

An action was brought by the plaintiff as executor of one Captain Ewing, deceased, against the defendant corporation to recover the sum of 1000*l.* under a policy of insurance dated October 12, 1905, and all matters in difference in the action were by order referred to the arbitrator.

By the policy Captain Ewing was insured with the defendants against death caused accidentally within the United Kingdom by violence due to any external and visible means in the sum of 1000*l.*, with the benefit of certain accumulative bonuses. The policy was subject to certain conditions indorsed upon it, amongst which was the following: "This policy does not insure against death or disablement, directly or indirectly caused by, arising from, or traceable to any of the following, viz.: Self injury or suicide, intoxicating liquors, war, invasion or civil commotion." The defendants admitted that if the plaintiff was entitled to recover on the policy he would be entitled to a total sum of 1450*l.* by reason of certain accrued bonuses.

The dispute between the parties was whether the death of Captain Ewing in the circumstances hereinafter set out was "directly or indirectly caused by, arising from, or traceable to . . . . war" within the true construction of the condition.

Captain Ewing was an officer in the Reserve of Officers, and on September 30, 1914, after the outbreak of war, received a commission as captain in His Majesty's Territorial Forces, from October 3, 1914. In consequence of the realm being in a state of war it became necessary to protect the South Eastern Railway in and about Folkestone Junction by means of guards and sentries posted at various places along the line, and the duty of protection was assigned by the military authorities to Captain Ewing and the company of Territorials under his command. The guards and sentries were visited by their officers at night, and usually by a subaltern, but it was the duty of the deceased as commanding officer of the company to visit them personally from time to time, and it was his practice to do so, and for the purpose of doing so it was necessary in the

ordinary course to walk alongside the rails of the railway. On the night of May 17, 1915, Captain Ewing walked alongside the rails of the railway in the course of his military duties as commanding officer for the purpose of visiting the guards and sentries, and whilst so walking he was accidentally knocked down by an engine or train and killed. The general public had no right to walk along or by the line at the spot where the accident occurred. In normal times the spot and its vicinity were illuminated to some extent by the lights from an adjacent signal-box, but at the time of the accident the lights were obscured in compliance with regulations made under the Defence of the Realm Act, 1914.

At the hearing before the arbitrator the main contention for the plaintiff was that the exception of "war" in the condition should be limited to cases of actual warfare acting physically in some way on the person of the assured to his detriment or injury and that the words "directly or indirectly" did not apply to the words "arising out of or traceable to."

The defendants relied on the condition, which they maintained was not so limited.

Subject to the opinion of the Court the arbitrator held, and in so far as it was a question of fact he found, that the death of the deceased was traceable to war, and awarded that the plaintiff was not entitled to recover anything from the defendants.

*Ernest Pollock, K.C.*, and *Raeburn*, for the plaintiff. The finding of the arbitrator was wrong. This case does not come within the exception clause in the policy. In that clause "war" means something in the nature of active hostilities in the course of which injury is caused to the assured. This injury was not directly or indirectly caused by and did not arise from and was not traceable to the state of war. This accident might equally have happened if there had been a mobilization only and no actual war. The causa proxima must alone be considered, and the war cannot be said to be the causa proxima in this case: *Ionides* v. *Universal Marine Insurance Co.* (1); *Lawrence* v. *Accidental Insurance Co.* (2); *Wicks* v. *Dowell & Co.* (3)

(1) (1863) 14 C. B. (N.S.) 259. (2) (1881) 7 Q. B. D. 216.
(3) [1905] 2 K. B. 225.

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*Gordon Hewart*, K.C., and *C. Doughty*, for the defendants. If Captain Ewing had been visiting sentries in France there could have been no doubt that he would have met his death through the war. It is just as necessary from military considerations that portions of railways in England should be watched as in France. There were ample materials upon which the arbitrator could find that the deceased's death was traceable to war. It is a question of fact in each case whether an event can reasonably be said to be traceable to war. The deceased's military duties took him upon the railway, and although being there was not the causa causans, it was the conditio sine qua non. [*Andrew* v. *Failsworth Industrial Society* (1) was referred to.]

*Ernest Pollock*, K.C., in reply. The maxim causa proxima non remota spectatur pervades the whole of insurance law. Difficulties at once arise if that maxim is departed from.

[SCRUTTON J. May not the words "directly or indirectly" have the effect of excluding the maxim?]

There is no authority as to the effect of those words, but they are not sufficient to set aside a maxim which forms the basis of insurance law. The words "or indirectly" do not apply to the facts of this case and are dormant. The deceased's military duties did not cause his death. It was the fact that the engine happened to come along at the moment it did that caused death: *Ionides* v. *Universal Marine Insurance Co.* (2); *Lawrence* v. *Accidental Insurance Co.* (3); *Wicks* v. *Dowell* (4); Macgillivray on Insurance, p. 953. The deceased was insured against accident, and a meaning ought not to be given to the exception so wide as to avoid the main contract. A reasonable meaning must be given to the exception.

SCRUTTON J., having stated the facts, continued: The defendants contend that, although the death was "caused accidentally . . . . by violence due to . . . . external and visible means," it was "indirectly caused by, arising from, or traceable to . . . . war," because war required the assured to be in this place where, by reason of the regulations made under the Defence of the Realm Act, 1914, in consequence of the war, he was exposed to a special

(1) [1904] 2 K. B. 32.
(2) 14 C. B. (N.S.) 259.
(3) 7 Q. B. D. 216.
(4) [1905] 2 K. B. 225.

danger. The arbitrator, after finding the facts, continues: "Subject to the opinion of the Court I hold, and in so far as it is a question of fact I find, that the death of the deceased was traceable to war." If he has adopted the true construction of the policy in law, in my judgment the question whether the death was traceable to war is one of fact, and I have no power to interfere with the finding of the arbitrator upon it. I could only interfere if no arbitrator could, on the true construction of the policy, properly come to that conclusion of fact.

The construction of this condition is not very easy, and it is clear that several questions might arise upon it; but, dealing with the particular matter which is before me, namely, whether I ought to uphold the finding of the arbitrator that the death of the deceased was indirectly traceable to war, I start with the consideration that to all policies of insurance, whether marine or accident, the maxim causa proxima non remota spectatur is to be applied if possible. The immediate cause must be looked at, and not one or more of the variety of causes which if traced without limit might be said to go back to the birth of the assured. For that reason, when there are words which at first sight go a little further they are still construed in accordance with that universal maxim. Thus it has been held upon the words "from all consequences of hostilities" that the proximate and direct consequences of hostilities are alone to be looked at: *Ionides* v. *Universal Marine Insurance Co.* (1) Where the words were "damage consequent on collision" it was decided that only the immediate and necessary consequences of the collision were to be looked at, and not what happened at the port of refuge in consequence of the collision: *Pink* v. *Fleming*. (2) In *Lawrence* v. *Accidental Insurance Co.* (3), where the assured was killed by a train and was on the line because, just previous to the train passing, he had had a fit, and there was an exception that the policy did not insure in case of death arising from fits or any disease whatsoever arising before or at the time or following such accidental injury, the immediate cause was again looked at, and it was held that the assured's representatives could recover although a fit placed him on the line where the railway engine

(1) 14 C. B. (N.S.) 259. (2) (1890) 25 Q. B. D. 396.
(3) 7 Q. B. D. 216.

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killed him. I have therefore to ascertain whether the language of this policy goes beyond and excludes the maxim.

The words in the condition "caused by" and "arising from" do not give rise to any difficulty. They are words which always have been construed as relating to the proximate cause. I am not sure whether the words "traceable to" would of themselves necessarily go any further. They are very vague words, and I should have been disposed to hold, if those were the only words, that, if the defendants choose to employ very vague words of that kind, the words must be read strictly against them and in accordance with the ordinary maxim. But the words which I find it impossible to escape from are "directly or indirectly." There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim causa proxima non remota spectatur. If it were contended that the result of the words is that the proximate cause, whether direct or indirect, is to be looked at, I should reply that that result does not appear to me to be consistent or intelligible. I am unable to understand what is an indirect proximate cause, and in my judgment the only possible effect which can be given to those words is that the maxim causa proxima non remota spectatur is excluded and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause.

But a line must be drawn somewhere. For instance, the birth of Captain Ewing, even though it may be said to have led in the chain of causation to his being in the position in which he was killed, could not be considered as causing his death; and if on the facts it was possible to hold, in accordance with the principles I have enunciated, that the clause was not applicable, I should have been able to find that his representatives had a claim. But I am unable to hold that any principle excludes, upon these facts, a possible finding by the arbitrator that war was the indirect cause of this accident. If war had merely placed Captain Ewing in a position not specially exposed to any danger, and in that position a particular incident not connected with war caused his death, I think that most probably in that case the matter would not come within the condition. For instance, suppose that, in connection with the war, the assured had gone to a military camp not in any way specially

exposed to lightning, but where lightning had struck and killed him, I should be disposed to think that the war was so remote from the death that in that case it could not be said that the death was indirectly caused by the war. If, however, the war had placed the assured in a position specially exposed to danger, as for instance in a place where he was specially exposed to being struck by lightning—if such a place can be conceived—and he was there struck and killed by lightning, it appears to me to be a question of fact, not of construction, whether the death was indirectly caused by war.

In the present case the arbitrator has found, as a fact, that the assured's death was indirectly traceable to war; and it is clear upon the facts that he was placed in a position of special danger—namely, he had to be about the railway line performing his military duties at night with the lights turned down, in consequence of war, and while doing his military duties in that position of special danger he was killed by reason of the special danger which prevails at that particular place and to which he was exposed by reason of his military duties. In those circumstances I am unable to hold that the arbitrator could not reasonably find, as a matter of fact, that the death was indirectly caused by war. In my judgment it was a matter for him to find, and not for me. I could only interfere with his finding if upon the facts he could not upon the true construction of the condition come to the conclusion at which he arrived. I must therefore find in favour of the defendants.

*Award upheld.*

Solicitors for plaintiff: *Bischoff, Coxe, Bompas & Bischoff.*
Solicitors for defendants: *Watson, Sons & Room.*

J. E. A.

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*July* 24.

## WILKINSON *v.* CLARK.

*Adulteration—Milk—Sale to Prejudice of Purchaser—Sample taken on Subsequent Day—Evidence—Admissibility—Milk and Dairies (Consolidation) Act*, 1915 (5 & 6 *Geo.* 5, *c.* 66), *Third Schedule.*

In a prosecution under the Sale of Food and Drugs Acts, 1875 to 1907, for unlawfully selling to the prejudice of the purchaser milk which is not of the nature, substance, and quality demanded by him, evidence as to the circumstances connected with a sample and its nature, substance, and quality taken on the day succeeding that on which the offence is alleged to have been committed is admissible on behalf of the prosecution for the purpose of showing that the milk sold on the day that the offence is alleged to have been committed could not have been in the condition in which it came from the cow.

But it is a condition precedent to the admissibility of the evidence (1.) that the sample taken on the succeeding day was from the same cow if the milking on the two days was from one cow, or from the same herd of cows if the milking was the product of a mixture; (2.) that the sample taken on the succeeding day was from the same milking, e.g., the morning milking as distinguished from the evening milking; (3.) that there is prima facie proof that the cows were milked in the same way, i.e., by some experienced person who understands the milking of cows.

The evidence would not be admissible on behalf of the prosecution for the purpose of showing that the sample taken on the succeeding day was below the standard required by the Regulations made under the Acts, and that therefore the accused had on the succeeding day committed an offence of the same nature as that which is the subject of the charge.

The Third Schedule to the Milk and Dairies (Consolidation) Act, 1915, has no bearing upon the admissibility of the evidence.

Case stated by justices for the West Riding of the county of York.

On March 1, 1916, an information was preferred by the appellant Wilkinson, an inspector appointed by the West Riding County Council under the Sale of Food and Drugs Acts, 1875 to 1907, against the respondent, a farmer, of Hook, for that he at Hook, on December 30, 1915, unlawfully sold to the prejudice of the appellant, the purchaser, milk which was not of the nature, substance, and quality demanded by the appellant. The respondent was a milk dealer owning several cows, and the sample sold to the appellant by

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the respondent on December 30, 1915, was from the joint mixed milk of several cows.

The report of the public analyst upon the sample taken on December 30, 1915, upon which the prosecution was based, showed that it was deficient in non-fatty solids, as it contained only 8·16 per cent. of non-fatty solids, whereas, having regard to the Sale of Milk Regulations, 1901 (1), at least 8·5 per cent. of non-fatty solids should be present in normal milk.

The appellant's advocate stated that on December 31, 1915, the appellant attended at the respondent's premises and obtained a sample of milk from the respondent, and the advocate desired to adduce evidence as to circumstances connected with the sample and its nature, substance, and quality.

The respondent's advocate objected to the justices receiving the evidence, and they declined to hear it as it did not appear to them that (in the absence of statutory authority to that effect) facts and circumstances connected with a different sample of milk purchased on a different day would be legal evidence bearing on the nature, substance, and quality of the milk mentioned in the information.

The Third Schedule to the Milk and Dairies (Consolidation) Act, 1915 (5 & 6 Geo. 5, c. 66) (which is not yet operative), enacts that under certain circumstances evidence may be given as to the composition of samples of different milk taken at another time subsequent to the sample in respect of which a prosecution is instituted. This appeared to the justices to be an indication that evidence such as they rejected was not at present available to a prosecutor. The justices accordingly came to the conclusion that the charge was not proved and dismissed the information. The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

*C. F. Lowenthal*, for the appellant. If the appellant had been allowed by the justices to produce the analyst's certificate with regard to the sample taken on December 31 he could have

(1) By the Sale of Milk Regulations, 1901, made under s. 4 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), where milk contains less than 3 per cent. of milk fat, or less than 8·5 per cent. of milk solids other than milk fat, it is to be presumed not to be genuine until the contrary is proved.

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shown that that sample contained a percentage of fat and non-fatty solids above that required by the Regulations made under the Sale of Food and Drugs Act, 1901. The defence being that the milk was sold on December 30 in the same condition as it came from the cow, the analyst's certificate with regard to a sample taken from the same cow on the next day is admissible on behalf of the prosecution. It is admissible because the milk on the second day was taken from the same set of cows in the same place: *Marshall* v. *Skett.* (1) Evidence of a similar milking of a cow under similar conditions is admissible.

The Third Schedule to the Milk and Dairies (Consolidation) Act, 1915, has no bearing upon the present case. It does not come into operation till after the war. The schedule is merely declaratory of the common law. The Legislature did not propose to create fresh evidence.

*A. L. B. Thesiger* (for *Harold Morris*, serving with His Majesty's Forces), for the respondent. The evidence was rightly rejected. The justices could not know whether the analyst's certificate of the sample taken on December 31, 1915, would prove another offence. If it had it would not be evidence of the offence charged. The only question was what was the condition of the milk on the particular day on which the offence charged was alleged to have been committed.

*Lowenthal* in reply. It is true that the certificate with regard to the sample taken on the succeeding day would not be admissible as evidence of habitual conduct by showing that that sample was also deficient in non-fatty solids, but if it showed that on the succeeding day the sample complied with the provisions of the Sale of Food and Drugs Acts it would be evidence that the milk sold on the first day had been tampered with.

LORD READING C.J., having stated the facts, continued: The sole question we have to decide is whether the evidence tendered by the advocate for the appellant was admissible. We are not asked to determine the value of the evidence. Upon behalf of the appellant it was contended that, assuming the prosecution could have established before the justices (as it was

(1) (1913) 108 L. T. 1001.

stated they could, although it does not appear in the case) that on the day immediately succeeding that on which the milk was purchased the appellant obtained a sample from the respondent direct from the cow, and that that sample showed a percentage of fat and solids above the regulation standard, evidence of those facts would be admissible to prove that the milk sold on the previous day from the same cow in which the percentage of fat and solids was below the regulation standard had been adulterated. To put it simply as an instance, if the milk in respect of which the charge was made showed 2·9 per cent. of fat instead of the regulation quantity of at least 3 per cent., and if the sample taken on the next day from the same cow at the same place gave 3·1 per cent. of fat, the contention on behalf of the appellant is that that evidence of the sample taken on the second day is admissible for the purpose of showing that on the first day the milk sold was not as it had been obtained from the cow, and that something must have been done to the milk on the day it was sold to the appellant which reduced the percentage of fat from 3·1 per cent. when the milk was taken direct from the cow on the second day to the 2·9 per cent. which it showed on the day it was sold to the appellant. In my judgment that contention is sound and the evidence would be admissible, but it would be for the justices to determine what value they attributed to it. Its weight would probably depend upon any evidence it might be possible for the seller to give as to any different treatment or circumstances on the second day which would lead to the conclusion that something must have happened to the cow either by reason of its food or, it might be, from some other cause which had the effect of its yielding milk containing a higher percentage of fat. It is possible that evidence of that kind might be given, and that, when given, it would counteract the effect of the evidence to which I have alluded, and which, in my judgment, is admissible.

The justices point out in the case stated by them that they were influenced in their decision by reason of a provision contained in the Third Schedule to the Milk and Dairies (Consolidation) Act, 1915, which is not yet operative. They thought it tended to show that evidence such as that tendered was not admissible. It is sufficient to say that that provision has no bearing upon the point.

I wish to guard against this judgment being construed as deciding

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that evidence would be admissible in support of a charge against the accused that on subsequent days the milk from the same cows was found to be lower in percentage of fat than the regulation standard. It must not be thought that we are deciding that that would be admissible evidence for the prosecution. It might be admissible for the defence, but we refrain from giving any decision upon that point. We are deciding only that in the circumstances of the present case, and for the purpose of proving the facts I have indicated, the evidence tendered by the prosecution was admissible. The appeal must therefore be allowed.

AVORY J. I agree. The justices appear to have decided that evidence with regard to a sample of milk taken on the day following that on which the offence was alleged to have been committed could not under any circumstances be admissible. In my judgment the evidence may be admissible, but only under certain conditions—namely, it must be established that the sample taken upon the day following that upon which the offence is alleged to have been committed is taken from the same cow if the milking on the two days is from one cow, or from the same herd of cows if the milking is the product of a mixture. Further, it is a preliminary condition to the evidence being admissible that it shall be shown that the sample taken on the subsequent day is from the same milking, that is to say, the morning milking as distinguished from the evening milking, between which, I understand, there are variations. To justify the admission of the evidence there must also be prima facie proof that the cows were milked in the same way, that is, by some experienced person who understands the milking of cows, because there, again, the quality of the milk may be altered by a person who does not understand the process and by not draining a cow sufficiently. Assuming that those conditions are fulfilled, it appears to me that such evidence as was tendered in this case may be admissible for the purpose of proving that the sample taken on the day when the offence is alleged to have been committed could not have been the genuine milk of the cow unadulterated.

I quite agree with what my Lord has said, namely, that if the evidence which is tendered is to the effect that on a subsequent day the milk was still below the standard, or was inferior to that taken

on the day when the offence is alleged to have been committed, it would not be admissible for the prosecution.

Low J. I agree. In the case of a prosecution for selling milk to the prejudice of the purchaser—and I desire to limit my judgment to a milk prosecution alone, i.e., to a case where the Court is dealing with a natural substance like milk—where it is either indicated by cross-examination or is set up as a substantive defence that the milk was sold in the state in which it was taken from the cow, evidence of this kind must, at all events, be admissible.

I entirely agree with what has been said by my Lord and by my brother Avory, that it is very necessary to safeguard this judgment and to warn justices that it must not be taken to go a word beyond the limits that have been laid down.

*Case remitted.*

Solicitors for appellant: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

Solicitors for respondent: *C. J. Smith & Hudson, for J. Burniston, Goole.*

J. E. A.

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*June* 6, 7, 8;
*July* 4.

## HULTON *v.* HULTON.

[1915 H. 595.]

*Husband and Wife—Action by Husband against Wife—Separate Property —Proceedings for Protection and Security—Right to Maintenance—Chose in Action—Action of Deceit—Separation Deed—Action for Rescission—Restitutio in integrum—Declaration—Rules of the Supreme Court,* 1883, *Order* XXV., *r.* 5—*Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 12.

By s. 12 of the Married Women's Property Act, 1882, every woman, whether married before or after the Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort.

A married woman brought against her husband an action for damages for deceit, alleging that by his false and fraudulent representations and concealment as to his means he had induced her to enter into a deed of separation and, in accordance with its terms, to live separate upon an inadequate allowance and to abstain from claiming a judicial separation or restitution of conjugal rights and a proper allowance by way of alimony :—

*Held,* that such an action was not a remedy for the protection and security of the plaintiff's separate property within s. 12 of the Act, and that, as she was suing her husband for a tort, the action was not maintainable.

The plaintiff also claimed to have the deed rescinded and declared void :—

*Held,* that such claims were maintainable both before and since the Married Women's Property Acts, and that in claiming such relief she was not suing her husband for a tort within s. 12 of the Act of 1882.

In the circumstances of the case the Court ordered the deed to be rescinded, and made a declaration that the plaintiff was not bound by it, although since action brought the marriage had been dissolved and, except as to acts done under it, the deed had ceased to be operative.

TRIAL of action before Lush J. and a special jury.

The statement of claim was as follows :—

"1. The plaintiff is the wife of the defendant. The defendant since 1904 has been and is the managing director of E. Hulton & Co., Limited, and has been since 1904 and is the largest shareholder

in and controls that company. The said company is and was at all material dates carrying on the business of newspaper proprietors and earning very large profits, and the shares in the said company are and always have been of great value.

"2. In or about the month of November, 1900, the plaintiff and the defendant were about to be married. The defendant was anxious to have the marriage kept secret as he feared that his father would not approve thereof. Accordingly the defendant in order to induce the plaintiff to consent to a secret marriage and to accept an allowance of 500*l.* a year orally informed the plaintiff that he was absolutely dependent upon his father, that he lived with and at the expense of his parents at home, that he had no capital or savings, that he had no income except a salary of 1000*l.* a year as an employee in his father's business, and that his father could at any time stop his income by having him removed from such employment and so make him penniless.

"3. In reliance upon the aforesaid representations and induced thereby the plaintiff agreed to a secret marriage and to accept the said allowance and the parties were married secretly on November 28, 1900.

"4. From the date of the said marriage down to 1904 the plaintiff from time to time urged the defendant orally and in writing to make their marriage public and to recognize her publicly as his wife and to set up a common home, but the defendant always in reply warned the plaintiff orally and in writing that he was afraid of his father's objections and that his terms of employment, financial position, and prospects remained unchanged.

"5. On March 28, 1904, the defendant's father died.

"6. In or about the months of April and May, 1904, the plaintiff again pressed the defendant orally and in writing to make their marriage public and to set up a common home, but the defendant refused to do so for the time being on the ground that it would be at that date an insult to his father's memory. The plaintiff thereupon orally requested the defendant until the marriage should be publicly announced to make her a larger allowance, but the defendant orally informed the plaintiff that he must for the present continue to live at home with his mother as he found that he was no better off on his father's death, and that although his gross

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income was somewhat larger his net income remained substantially the same. During the year 1904 the defendant repeated orally and in writing the said representations, and told the plaintiff that all he could afford to do was to continue to allow her the 500*l.* a year, which was approximately half his net income.

"7. Relying on the said representations and induced thereby the plaintiff continued to acquiesce in the marriage being kept secret and in her allowance remaining at 500*l.* a year.

"8. In or about the month of February, 1905, the defendant deserted the plaintiff and refused to continue cohabitation with her, but the defendant continued to allow to the plaintiff 500*l.* a year.

"9. In the year 1907 and again in 1909 the defendant in order to induce the plaintiff to be content with and accept the allowance of 500*l.* a year repeated in writing his representations that this was the utmost which he could afford to do.

"10. In or about the end of the year 1909 the plaintiff requested that her allowance should be put on a definite footing, that certain debts should be paid by the defendant, and that her allowance should be increased. Negotiations commenced between the plaintiff and the defendant and led to his solicitors, Messrs. Lewis & Lewis, suggesting a deed of separation between the parties. The defendant was aware that the plaintiff in the said negotiations was relying upon the truth of his said representations which he had as aforesaid made to her as to his financial position and means and that she was agreeing to the said deed upon the basis that the said representations were true. The defendant did not disclose to the plaintiff the true facts as hereinafter set out, but fraudulently concealed the same with intent to induce the plaintiff to enter into the said deed and to accept the provision for her maintenance therein contained.

"11. Relying upon the said representations and induced thereby and by the concealment hereinbefore pleaded the plaintiff executed a deed of separation dated June 7, 1910. By the said deed the plaintiff and the defendant agreed to live separate and apart and the plaintiff agreed to accept an allowance of 500*l.* a year. Upon the execution of the said deed and at the request and on the insistence of the defendant all correspondence between the parties

was destroyed, and the plaintiff is therefore unable to give particulars of the precise dates of the representations hereinbefore set out.

" 12. The whole of the representations made by the defendant as to his financial position were wholly untrue and were known to him to be untrue. During his father's lifetime the defendant owned 10 per cent. of the share capital of E. Hulton & Co., Limited, and received therefrom annually large sums by way of dividends in addition to his salary of 1000*l.* a year and other emoluments. By virtue of his father's will the defendant besides other moneys and the managing directorship of the company became entitled to one-third of his father's holding of shares in E. Hulton & Co., Limited, which amounted to 103,276 out of 114,757 issued share capital. Ever since his father's death the defendant has enjoyed great wealth and has been in receipt of an income of from 40,000*l.* to 50,000*l.* a year.

" 13. By reason of the aforesaid fraud of the defendant the plaintiff has been prevented from demanding or receiving a proper allowance adequate to her position as the defendant's wife and has been and is being deprived of the difference between such allowance and the sum of 500*l.* a year payable as aforesaid and under the said deed, and the plaintiff has thereby suffered damage and loss.

" The plaintiff claims—

" (i.) Damages for fraud.

" (ii.) In further relief or alternatively rescission of the aforesaid deed."

The deed was dated June 7, 1910. It recited that unhappy differences had arisen between the parties and that they had agreed to live separate and apart from each other for the future, and that all charges made by either of them against the other were withdrawn. It provided as follows :

" 1. It shall be lawful for the wife at all times hereafter to live separate and apart from the husband and free from his marital control and authority as if she were sole and unmarried and to reside from time to time at such place as she may think proper without any interference whatever on the part of the husband.

" 2. Neither of them the husband nor the wife shall molest annoy or in any way interfere with the other of them.

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"3. [Common form—no legal proceedings for restitution of conjugal rights nor by wife for divorce or judicial separation in respect of any previous marital offence.]

"4. The husband will and shall during the joint lives of himself and the wife pay to the wife the clear annual sum of 500*l.* free of income tax and without any deduction whatsoever and in the event of the wife surviving the husband the same sum shall continue to be paid by his representatives during the remainder of the life of the wife or until she shall marry again. The said annuity shall be considered as accruing from day to day but shall be paid by equal quarterly payments on the usual quarter days the first payment being made as on June 24, 1910, and the wife shall not have power during her coverture to anticipate such annuity.

"5. [Common form—wife to maintain herself.]

"6. [Common form—wife to indemnify husband.]

"7. The husband hereby releases the wife from various sums of money advanced by him to her but in case the husband shall be obliged to pay any sum or sums of money for or on account of any debt liability or tort heretofore or hereafter contracted incurred or committed by the wife then and in every such case it shall be lawful for the husband to retain out of the said annuity the amount so paid by him together with all costs charges and expenses which he may incur in connection therewith but so that this present provision shall not in any wise render the husband liable in respect of any of the debts liabilities or torts of the wife or prejudice his rights or remedies under the covenant of indemnity by the wife hereinbefore contained.

"8. All the letters written or telegrams sent by the husband to the wife or by his solicitor to her or to her solicitors and sent by the wife to the husband or by her solicitors to him or to his solicitors and all copies of such letters and telegrams shall be handed over to the husband's and wife's solicitors respectively on the execution hereof for immediate destruction in the joint presence of the solicitors of the husband and wife and no such letters or telegrams or copies thereof shall be retained by the wife or her solicitors or by the husband or his solicitors.

"9. [Common form—avoidance of deed in case of reconciliation or judicial separation.] "

The defendant in his defence traversed several of the above allegations. He also submitted that, assuming the allegations to be true, the statement of claim disclosed no cause of action. The point of law thus raised was argued at the conclusion of the evidence and before the learned judge summed up the case to the jury.

*Sir J. Simon, K.C., Hemmerde, K.C., D. M. Hogg,* and *P. Guedalla,* for the plaintiff. This action is maintainable. A married woman can sue her husband for any tort provided that the action is a remedy "for the protection and security of her own separate property": Married Women's Property Act, 1882, s. 12. (1) The wife whose husband deserts her—a fortiori if he is unfaithful to her—has certain rights given her by law which she is entitled to liquidate and reduce into possession. If the plaintiff had not been tricked and defrauded by the defendant she would never have consented to the terms of this deed. Then if the defendant had refused to live with her she might have supplied herself on his credit with necessaries suitable to his means and position. If she had taken proceedings for restitution of conjugal rights or for a decree of judicial separation she would have obtained a decree evaluating this right to be maintained by the defendant. The right to this evaluation is a chose in action. It matters not in what Court the process of assessment takes place. That chose in action is her separate property. By s. 24 of the Act of 1882 "property" includes "a thing in action." She has been cheated out of that property by the fraud of the defendant, and an action for that fraud is therefore a remedy for the protection of her separate property.

*Gordon Hewart, K.C.,* and *McCardie,* for the defendant. If the argument for the plaintiff is sound, every action of tort brought by a married woman is a remedy for the protection and security of her separate property, because the damages recovered are her separate property: Married Women's Property Act, 1882, s. 1,

(1) The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . . for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort . . . ."

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sub-s. 2. The right to pledge her husband's credit is not a chose in action, because by no action known to the law can the right be vindicated. Neither is a right to alimony a chose in action, because by no action at law or in equity can it be vindicated: *Bailey* v. *Bailey* (1); *Robins* v. *Robins*. (2) Alimony is purely a matter for the ecclesiastical tribunal and is only granted as incidental to other relief.

*Sir J. Simon, K.C.*, in reply.

LUSH J. The question which I have to decide before directing the jury is of great importance, but, notwithstanding a clear and forcible argument for the plaintiff, it admits of only one answer. The question is whether an action for damages for fraud is maintainable by a wife against her husband. In fact the marriage had been dissolved before the trial of this action, but that fact is in the circumstances immaterial. It is originally an action of deceit for the false and fraudulent representations by the husband as to his means whereby it is alleged that the wife was induced to enter into a deed of separation containing covenants by her, which she has observed, to live separate and apart from him and to accept an inadequate allowance. The question is whether such an action can be maintained. I am clearly of opinion that it cannot. No such action has ever been brought before, and yet, if Sir J. Simon is right, such an action could have been brought in a Court of Equity before the Married Women's Property Acts. He contended that this action was a remedy for the protection and security of the plaintiff's separate property; but ever since equity evolved the separate estate of married women the Courts of Equity have recognized suits for the protection and security of such property, suits which could be brought not only against third persons but against the husband also. If, for example, he committed waste in relation to her separate real property, or deprived her of chattels which were her separate personalty, she was competent to maintain proceedings to have her property protected and secured. And yet there is no example of an action such as this. It is clear that no such action could be brought in a Court of Law, because, for one reason, at law a married woman could not sue alone; her husband had to be

(1) (1884) 13 Q. B. D. 855. (2) [1907] 2 K. B. 13.

joined as plaintiff although the meritorious cause of action was her own. Another and still stronger reason was that in the view of the common law husband and wife were one person, and an action by one against the other was inconsistent with that view and therefore impossible. This was not so in the view of a Court of Equity, which permitted a married woman to sue alone for the protection and security of her separate estate. But no precedent can be found for such an action as this.

Then is the action maintainable since the Married Women's Property Act, 1882? Sect. 1 of that Act removes the disability under which a married woman suffered at law. In respect of and to the extent of her separate property she can now sue and be sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her. If the legislation had stopped there a question must have arisen whether the free power of bringing actions so conferred upon a married woman included an action against her husband. It was not the intention of the Legislature that a woman should be in any worse position than she was in before the Act, but that she should occupy precisely the same position with regard to her husband in relation to her separate property. Sect. 12 deals with this particular class of action. It has incorporated in the Act a provision recognizing the practice of the Courts of Equity and has expressly allowed a married woman the same remedies against her husband for the protection and security of her separate property as if the property belonged to her as a feme sole. If a proceeding is necessary for the protection and security of a married woman's separate property, that proceeding can be taken against those who interfere with it, her husband as well as third persons. But proceedings against her husband for tort which do not come within the class of remedies for the protection and security of her separate property cannot be instituted by a married woman against her husband.

It is said that the plaintiff is bringing this action for the protection and security of her separate property. First it is said that she had separate property in this, that, having been deserted by her husband, she had the right at common law to pledge his credit

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for necessaries suitable to his means and position. So she would have had, if deserted. But is that separate property of the wife, and is this action brought to protect and secure separate property of that kind? However elastic the words "separate property" may be, it is impossible to say that they include such a right as that. It is said that by s. 24 property includes choses in action. I agree. But this right of a wife to pledge her husband's credit is not a chose in action. She could never bring an action for the price of the necessaries. The argument seems to ignore the nature of the right. The law gives her a mandate of necessity from her husband to buy the necessaries on his credit. This is not a chose in action; it is a power or an authority. Accordingly the plaintiff fails on this point even assuming that she was deserted. As to whether she was or not I need say no more than that I am by no means clear that she was.

Secondly, it was said that the plaintiff had the right to petition the Divorce Division for restitution of conjugal rights or for judicial separation; that the Court on such a petition would make a proper order for alimony; that her right to petition for alimony was her separate property, and that the present action was brought to protect it. I have no doubt that this right was not her separate property. The power of the Divorce Division to decree alimony is a power exercised formerly by the Ecclesiastical Courts in their exclusive jurisdiction over matrimonial causes. When proceedings have been instituted the Court has power to compel the husband to do that which is fit and proper. But the right to petition the Court to exercise its power is not a chose in action. Before proceedings are commenced in the matrimonial Court it cannot be said that the injured wife has a right of action for alimony, or that a right to petition the Court for a decree, which will no doubt involve a decree for alimony, is a chose in action. On this ground also the plaintiff fails to establish that the present action is a proceeding for the protection and security of her separate property. The action in so far as it is an action for damages for fraud fails, and the only question I shall leave to the jury is whether the separation deed of June 7, 1910, was induced by the fraud of the defendant.

[The learned judge then summed up the evidence, and the jury in answer to the question left to them, found that the plaintiff was

induced to execute the deed of separation by the false and fraudulent representations and concealment of the defendant.]

Shortly before the date of the writ in the present action the plaintiff had filed a petition in the Divorce Division for a dissolution of her marriage with the defendant. On July 8, 1915, she obtained a decree nisi, and on February 7, 1916, the decree was made absolute.

*Sir J. Simon*, *K.C.*, *Hemmerde*, *K.C.*, *D. M. Hogg*, and *P. Guedalla*, for the plaintiff, claimed a declaration that the plaintiff was induced to execute the deed by fraud and an order that it should be rescinded.

*Gordon Hewart*, *K.C.*, and *McCardie*, for the defendant. A plaintiff who sues to rescind a deed on the ground of fraud is suing for a tort within the meaning of s. 12, which provides that, "except as aforesaid, no husband or wife shall be entitled to sue the other for a tort." The relief sought does not decide the question whether one party sues another for a tort. Whether the plaintiff sues for damages for fraud or sues for rescission of a deed for fraud she is still suing for a tort, namely, fraud.

[Counsel also contended that the claim to rescind the deed must fail, because there could be now no restitutio in integrum for the following reasons:—The plaintiff had accepted two quarterly payments of the annuity under paragraph 4 of the deed and had made no offer to return them; the defendant in pursuance of paragraph 7 had released the plaintiff from a debt which she owed him; in pursuance of paragraph 8 all letters passing between the parties had been restored to their writers and destroyed. It was further argued that by paragraph 9 the deed had come to an end by the decree of dissolution of marriage and there was nothing upon which a decree of rescission could operate; and that no other decree or declaration could be made without an amendment of the statement of claim, which, in the circumstances, ought not to be allowed. The facts and arguments relating to these contentions sufficiently appear from the judgment. Upon the question whether a declaration should be made that the plaintiff was not bound by the terms of the separation deed the following cases were cited: *Dyson* v.

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*Attorney-General* (1); *Dyson* v. *Attorney-General* (2); *Guaranty Trust Co. of New York* v. *Hannay & Co.* (3); *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (4)]

*Sir J. Simon, K.C.*, in reply.

July 4. LUSH J. read the following judgment:—The jury having found that the deed of separation was induced by fraudulent misrepresentations, and I having held that the plaintiff is not entitled to recover damages, I have now to say whether she is entitled to rescission and to a declaration either in addition to or in lieu of rescission, and whether the latter remedy is open to the plaintiff on the pleadings, or, if not, whether they should be amended. These questions were reserved until after the verdict.

The declaration asked is that the plaintiff was induced to execute the deed by fraud. I do not think that it can be made in that form, if at all. It must be a declaration of the plaintiff's rights, and she must be in a position to assert that she is not bound by the deed. I will treat the proposed declaration as containing that statement, as I think under the circumstances I ought to do.

Now the first question is whether the same difficulty applies to these forms of relief as applies to the claim for damages. Is an action brought for rescission on the ground of fraud, or for such a declaration as I have mentioned, an action for a tort, and therefore prohibited in such a case as this by s. 12 of the Married Women's Property Act, 1882? I do not think that it is. It is true that a tort, in this case deceit, has to be proved as a condition of the remedy, but one would not naturally describe the action as an action for a deceit or for a tort, any more than one would describe an action for rectification on the ground of mutual mistake as an action for a mistake. What I think the legislation intended to prohibit was ordinary actions of tort, personal torts, brought to recover damages, or, as Rowlatt J. held in *Webster* v. *Webster* (5), an action to prevent the commission of a tort. It was evidently thought injurious in the interests of public policy to allow such actions, which could not be brought before the Act, to be brought by husband against

(1) [1911] 1 K. B. 410.
(2) [1912] 1 Ch. 158.
(3) [1915] 2 K. B. 536.
(4) (1904) 9 Com. Cas. 289.
(5) [1916] 1 K. B. 714.

wife or by wife against husband. But they can enter into contracts and convey property to each other, and to prevent their applying to the Court for relief against a contract or conveyance improperly obtained would, it seems to me, be very unreasonable. Moreover, such an action was maintainable before the Act. *Evans* v. *Carrington* (1) is an instance. It is true that the fraud there was of such a character that it would be against public policy to allow the deed to be operative, and it is also true that the writ was commenced after the marriage had been dissolved, but I do not think that either of these facts is material. The fraud there was committed during the coverture, and it certainly was not considered that the plaintiff was suing the defendant, who was formerly his wife, for a tort committed during the coverture. I cannot doubt but that s. 12 of the Act has not deprived a wife or a husband, as the case may be, of the right to have a contract or a deed of conveyance set aside if improperly obtained.

With regard to the declaration, I think it equally clear that s. 12 does not prohibit an action for that purpose. In *Evans* v. *Edmonds* (2) it was held that a husband could plead his wife's fraud or that of her trustee as an answer to an action by the latter for arrears of the agreed allowance, and that the deed was avoided on proof of such fraud. In asking to have it declared that the deed has been avoided I do not think it possible to say that the wife is suing her husband for a tort or that s. 12 has prohibited her from doing so. Before coming to the opposite conclusion one would require far clearer terms than are to be found in that section. I must therefore hold that the statute affords no answer to the action so far as this relief is concerned.

The next question raised by Mr. Gordon Hewart to the claim for rescission is this: he says that the Court has never ordered rescission where the party claiming it has acquiesced in or acted upon the deed and taken benefits under it after discovering the fraud, and he says that the plaintiff has so acted in this case. Now this contention raises and depends upon an issue of fact. No such issue was raised, and no question was left to the jury upon it. Nor was I asked to leave one although I said what questions I proposed to leave. I do not think that it would really have assisted the

(1) (1860) 2 D. F. & J. 481. (2) (1853) 13 C. B. 777.

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defendant had the plea been added and the question left. What Mr. Gordon Hewart really relied upon was the plaintiff's own admission that after the writ was issued she accepted two quarters' payments under the deed. If there had been a clear admission of the acceptance of such payments under circumstances which showed an unequivocal intention to treat the contract as still subsisting and rely exclusively on the claim for damages, I should have thought the plaintiff could not obtain rescission even without the plea, as, considering the nature of the remedy, it would have been wrong to allow her, having failed to recover damages, to fall back upon this contention and ask to have the deed, on which she had knowingly acted, set aside. But there was no such admission, and I do not think that the plaintiff ever did really act upon or recognize the validity of the deed. The defendant by his solicitor paid the allowance for the two quarters into the plaintiff's banking account to her credit. She was at that time petitioning for divorce, and it is quite clear what she did. Instead of applying for alimony she was content with the moneys that were being provided, and, while claiming rescission as well as damages in her writ, she dealt with the moneys which the defendant her husband was providing for her maintenance. He was bound to provide for her pending the suit, and his position has not really been altered through the acceptance of the money by the plaintiff. After the first two quarters were provided for, her solicitors, apparently becoming aware of the possible contention, wrote that the moneys should be accepted without prejudice. I do not think that I can hold in these circumstances that the plaintiff has lost her right to the rescission merely by retaining and accepting the moneys thus provided.

Then it is said that there can be no restitutio in integrum in this case, and on that ground rescission ought to be refused. First it is said that the plaintiff has not offered to give up the benefits that she has received under the deed and refund the moneys paid by way of allowance, and that she must do this before obtaining rescission. Considering the relation between the parties and the defendant's obligation to maintain the plaintiff during those years—an obligation existing altogether apart from the contract—I do not think that the allowance which the plaintiff received under the

deed for her maintenance can properly be regarded as a benefit received under the deed for this purpose which she ought to refund. It was in fact altogether inadequate having regard to the defendant's actual means and to the finding of the jury. There was a concession which the defendant made to her and which stands, I think, on a different footing, and that was a release from the repayment of a loan which he had made to her. No separate point was made of this during the argument. The amount was not large, but it ought, I think, to be open to the defendant to insist upon repayment if the plaintiff insists upon rescission. I will consider this later when I consider the claim to a declaration.

The second point was this: It was a term of the contract that all the correspondence between the parties should be destroyed, and this was done. It is said that the letters would assist the defendant, and that as they cannot be restored and the plaintiff's letters returned to him, it will be unfair and contrary to the practice followed in these cases to rescind the deed and leave him worse off than he was before it was executed. This is a plausible argument, but I do not think that it ought to prevail. The jury have clearly indicated by their verdict that the letters were, in their view, of no value or benefit to the defendant, and upon that view I must of course act. The defendant therefore, not having been prejudiced by the loss of the letters, cannot set up that loss as an answer to the claim for rescission. I have some doubt whether the destruction of the letters really affects the subject-matter of the contract so as to bring it within the rule that a restitutio in integrum is a necessary condition of rescission, but I assume it for the purpose of my decision.

Lastly it was said that the deed according to its terms has come to an end by reason of the decree for divorce and that the Court cannot, or ought not if it can, to rescind it. I think that Sir John Simon answered this contention by pointing out that it can still operate for (no doubt) a limited purpose. The plaintiff has agreed to indemnify the defendant in respect of certain matters by the deed, and its determination was to be without prejudice to any acts done under it. It may still be operative. That is, I think, a sufficient answer to this contention. In the result, therefore, the plaintiff is in my opinion entitled to have the deed rescinded.

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The next question is whether the plaintiff is entitled to the declaration which is claimed in addition to or in substitution for rescission. This claim really appears to me to be the more appropriate remedy in a case like this if it is available at all. If a conveyance has been executed and property transferred, actual rescission is of course necessary, but where the subject-matter of the action is a contract which for all material purposes has come to an end, a declaration appears to me to be all that is required. It is certainly what the plaintiff is interested in obtaining under the special circumstances of this case. Now I think it is open to the plaintiff to claim it as further or other relief without specifically claiming it in her statement of claim. Order xx., r. 6, expressly provides for such a case as this. But if it were necessary I would give leave to amend by adding it. I cannot think that the defendant would have admitted it, as was submitted to me, had it been specifically claimed. He could equally have admitted the claim to have the deed rescinded. In either case the charge of fraud was on the pleadings, and that had to be tried before the plaintiff could protect herself in the maintenance proceedings to which I am going to refer. It is for that reason that the claim for rescission and for the declaration was really made. The position was this: The plaintiff filed a petition for divorce just before she issued the writ and she has obtained a decree. Proceedings for permanent maintenance are pending. The fact that the wife of a divorced husband agreed to live apart from him and to take a small and wholly inadequate allowance having regard to his means is a circumstance which I am satisfied is taken into consideration by the judge of the Divorce Court in determining what amount of maintenance should be paid. Moreover this dispute has arisen in those proceedings. The defendant is asserting that the plaintiff deceived him into marrying her. He has accused her of this deception, and his case is that this explains her accepting the small allowance. Her case is that there was no ground for the accusation and that she accepted the allowance only because he deceived her as to his means. In those circumstances the plaintiff seeks to have the declaration in order to safeguard her rights in the maintenance proceedings. Now is the declaration one which the Court can properly make? The fact that the plaintiff could claim no consequential relief at law is no

reason for refusing a declaration as to her rights with regard to the deed. This is provided for by Order xxv., r. 5. But the declaration must be of some right on her part. Thus a declaration that a party to a contract was not bound by it was made by Channell J. in the case of *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1) Having regard to the fact that the adjustment of her rights with regard to maintenance and the amount to be allowed to her by the Divorce Court will depend to some extent upon the question whether she voluntarily executed the deed and accepted the allowance of 500*l.* a year and is bound by that deed, I think that the plaintiff would have been entitled to maintain this action if she had sued for a declaration and nothing more. It may not be necessary to add it if the deed is rescinded, but I think the plaintiff is entitled to it if she demands it. But even if she could not obtain rescission because of the destruction of the letters, I still think that she would be entitled to the declaration. It would be a good answer if the defendant were to take proceedings for an indemnity under the deed, or if he relies upon it for any purpose, that she was induced to execute it by fraud and that the deed is avoided although it has not been rescinded. This is shown by the judgments in *Evans* v. *Edmonds* (2) already cited. I do not think that as a condition of the declaration the plaintiff could be compelled to repay the loan to which I have referred. It must be a subject of separate proceedings if the defendant insists upon repayment. Probably some arrangement can be made with regard to this.

I would add that if the plaintiff had elected to affirm the deed after discovering the fraud no declaration of right with regard to it could, in my opinion, have been made, but, as I have said, there was no such election.

[The plaintiff not objecting to give the undertaking mentioned below, the learned judge in the end made a declaration that the plaintiff was induced to execute the deed by fraud and that it was not binding upon her, and an order that the deed should be rescinded, the plaintiff undertaking as a condition of the judgment to refund the amount of the loan by means of a deduction from her taxed costs. The costs to follow the event, but the defendant

(1) 9 Com. Cas. 289. (2) 13 C. B. 777.

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to have such extra costs as were occasioned by the claim for damages, these costs, if any, to be set off against the equivalent part of the costs payable to the plaintiff.]

*Order accordingly.*

Solicitors for plaintiff: *Guedalla & Jacobson.*
Solicitors for defendant: *Lewis & Lewis.*

W. H. G.

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*Distinguished.* BERENG GRIFFITH LEROTHOLI v. THE KING [1950] A. C. 11

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*May 29; July 31.*

[COURT OF CRIMINAL APPEAL.]

## THE KING *v.* BASKERVILLE.

*Criminal Law—Evidence of Accomplice—Corroboration—Nature of Corroboration required.*

Where on the trial of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.

APPEAL to the Court of Criminal Appeal against conviction.

The prisoner was tried at the Central Criminal Court on an indictment charging him with having committed acts of gross indecency with two boys contrary to s. 11 of the Criminal Law Amendment Act, 1885. The only direct evidence of the commission of the acts charged was that of the boys themselves, who on their own statement were accomplices in the offence. The acts charged were alleged to have been committed in a flat in which the prisoner resided. The prisoner gave evidence and admitted that the boys, who were of a humble position in life, came to his flat by his invitation, but he accounted for that by saying that he invited them there from philanthropic motives, being desirous of getting them some better form of employment than that in which they were then engaged, and wishing to talk over their prospects with them. A letter was produced, addressed to one of the boys, which was in the following terms:—"Dear Harry,—Here is something for you and Charlie. As to Sunday week, will you and he meet me as

arranged at 8, not 7.30. (Signed) B." The letter, which the prisoner admitted to be in his handwriting, contained a 10*s.* Treasury note. Charlie was the Christian name of the other boy. The judge warned the jury that they ought not to convict the prisoner upon the evidence of the boys unless it was in their opinion corroborated in some material particular affecting the accused, but told them that the above-mentioned letter afforded evidence which they would be entitled to find was sufficient corroboration. The jury found the prisoner guilty. The prisoner appealed against his conviction.

*Marshall-Hall, K.C.*, and *Ginsburg*, for the appellant. There was here no evidence which the jury were warranted in treating as corroboration of the boys' story. It is no doubt well settled that a jury may convict on the evidence of accomplices alone provided they are given a proper warning that they ought not to do so unless there is sufficient corroboration : *Reg.* v. *Avery* (1); *In rè Meunier* (2); *Reg.* v. *Andrews* (3); but where the evidence alleged to be corroboration is not in law sufficient to be left to the jury as such, a warning which neglects to tell them so is not a proper warning. Here the judge misdirected the jury in telling them that they might find that the letter was sufficient corroboration. Being capable of an innocent construction, it does not go to implicate the accused. The rule on this subject is correctly laid down in Russell on Crimes, 7th ed., vol. 2, p. 2287 : "It is not sufficient to corroborate an accomplice as to the facts of the case generally. He should be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged." That proposition is abundantly supported by authority. In *Rex* v. *Wilkes* (4) Alderson B. directed the jury that confirmation of the accomplice as to the commission of a felony is no confirmation at all unless it "goes to fix the guilt on the particular person charged." In *Reg.* v. *Farler* (5) Lord Abinger, in summing up to a jury, said : "The corroboration ought to consist in some circumstance that affects the identity of the party accused." In that case, which was

(1) (1845) 1 Cox, C. C. 206.
(2) [1894] 2 Q. B. 415.
(3) (1845) 1 Cox, C. C. 183.
(4) (1836) 7 C. & P. 272.
(5) (1837) 8 C. & P. 106.

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one of night poaching, he told the jury that the fact that the prisoner and the accomplice were drinking together late at night in a public-house to which the former habitually resorted was no sufficient corroboration of the prisoner's guilt. In *Reg.* v. *Dyke* (1) Gurney B. said: "The confirmation should be as to some matter which goes to connect the prisoner with the transaction." In *Reg.* v. *Birkett* (2) Patteson J. said: "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient." In *Reg.* v. *Jenkins* (3) it was laid down that "Where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other." In *Reg.* v. *Mullins* (4) Maule J. said: "The confirmation of an accomplice as to the mere fact of a crime having been committed, or even the particulars of it, is immaterial, unless the fact of the prisoner being connected with it is so"—i.e. confirmed. In *Reg.* v. *Stubbs* (5) Jervis C.J. said: "Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may, no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner; but it is proper for the judge in such a case to advise the jury that it is safer to require confirmation of the testimony of the accomplice as to the third prisoner, and not to act upon his evidence alone"; and Parke B. stated the rule of practice in similar terms. On the other hand, Wightman J. stated that "It has not been the uniform practice to require confirmation as to all the prisoners. In some cases it has been held that if there be confirmation of the accomplice as to one of the prisoners, the jury may convict as to all." In *Rex* v. *Everest* (6), where the appellant was charged with being party to a robbery, Darling J. said: "The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused. It is not sufficient that there should be corroboration in

(1) (1838) 8 C. & P. 261.
(2) (1839) 8 C. & P. 732.
(3) (1845) 1 Cox, C. C. 177.
(4) (1848) 3 Cox, C. C. 526, 531.
(5) (1855) Dears. 555, 557, 558.
(6) (1909) 2 Cr. App. R. 130, 132.

some particular which does not touch the prisoner." The Court there quashed the conviction upon the ground that the fact of the appellant having been seen in a public-house talking to the admitted thief shortly before the robbery was no evidence of his being a party to it. The correctness of the rule as above laid down was not seriously questioned till 1911, when Lord Alverstone C.J. in the case of *Rex* v. *Wilson* (1) said : " It must not be supposed that corroboration is required amounting to independent evidence implicating the accused." That dictum was only obiter, as the Court, being of opinion that a sufficient caution had been given, dismissed the appeal. In a later case in the same volume, *Rex* v. *Blatherwick* (2), Lord Alverstone C.J. in the course of argument said : " *Everest* (3) goes too far ; *Wilson* (1) is the correct statement of the law." In *Rex* v. *Watson* (4) Pickford J. suggested that " corroboration generally that the story is true is sufficient," but he added that it was unnecessary to decide the question in that case. In *Rex* v. *Willis* (5) Lord Reading C.J. reaffirmed the rule as laid down in *Rex* v. *Wilson* (1) and explained certain dicta in his judgment in *Rex* v. *Cohen* (6) from which it had been inferred that he was of the contrary opinion. It is contended that the rule as laid down in *Rex* v. *Everest* (3) is the correct one.

*Bodkin*, for the prosecution. The object of requiring corroboration of the evidence of an accomplice is merely to show that the witness was presumably telling the truth, and therefore the corroboration need not be in a matter directly affecting the prisoner's connection with the crime charged. The rule is correctly stated in Stephen's Digest of the Law of Evidence, art. 121 : " When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so." But in the present case it is unnecessary to decide the question, for there was in any view abundant corroboration pointing to the prisoner's guilt.

(1) (1911) 6 Cr. App. R. 125, 128.
(2) (1911) 6 Cr. App. R. 281.
(3) 2 Cr. App. R. 130, 132.
(4) (1913) 8 Cr. App. R. 249, 253.
(5) [1916] 1 K. B. 933.
(6) (1914) 10 Cr. App. R. 91.

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At the close of the arguments the COURT intimated that in their opinion there was ample corroboration affecting the accused, and that the appeal would be dismissed; but that, having regard to the importance of the question raised and the difference of judicial opinion upon it, they would take time to consider their judgment.

*Cur. adv. vult.*

July 31. The judgment of the COURT (Lord Reading C.J., Scrutton, Avory, Rowlatt, and Atkin JJ.) was delivered by

LORD READING C.J. The appellant was convicted of having committed offences under s. 11 of the Criminal Law Amendment Act, 1885, with two boys. He appeals to this Court on the ground that there was no such corroborative evidence as is required by law of the testimony of the boys who were called for the prosecution at the trial and were accomplices in the crime. There is no statutory provision requiring corroboration applicable to these offences.

At the close of the arguments we decided that there was abundant corroboration. In addition to the testimony of the accomplices, the following facts were given in evidence:—A letter was proved to have been sent to one of the boys by the appellant in his handwriting signed by him with his initial B., without any address on the letter, enclosing a 10*s.* note to "Dear Harry," one of the boys, for himself and "Charlie," another of the boys, and making an appointment for them to meet the appellant "as arranged," without naming the place, and at a time stated. The prisoner had admitted to the police that the boys had been at his flat, that he knew one as a page-boy at the Trocadero Restaurant, and that this boy had been to see him on several occasions with another boy, and the appellant suggested to the police that he belonged to a boys' club and, therefore, was entitled to invite any of the members to his place. The appellant was not a member of a boys' club. The appellant gave evidence at the trial and admitted that he had given money to the boys on various occasions, and that, on hearing a peculiar whistle outside his flat, he had gone downstairs to let the boys in. We entertained no doubt that this evidence afforded ample corroboration of the boys' testimony, even if we assumed that the corroboration required was corroboration "in some material particular implicating the

accused." The learned Recorder directed the jury that they must not convict upon the testimony of the accomplices unless they were satisfied that there was "corroboration in some material particular affecting the accused." We were of opinion that in any event this direction gave no cause of complaint to the appellant. The warning by the Recorder to the jury was sufficient, if indeed not more than sufficient. We, therefore, intimated that the appeal would be dismissed.

Having regard, however, to the arguments addressed to the Court, and to the difficulty of reconciling all the opinions expressed in the cases cited, and to the general importance of reviewing and restating the law applicable to corroboration of the evidence of accomplices, we took time to consider our judgment.

There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: see *Rex* v. *Atwood*. (1) But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence: *Reg.* v. *Stubbs* (2); *In re Meunier*. (3)

This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed: *Rex* v. *Tate*. (4) If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this Court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this Court, after

(1) (1787) 1 Leach, 464.
(2) Dears. 555.
(3) [1894] 2 Q. B. 415.
(4) [1908] 2 K. B. 680.

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considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence: Court of Criminal Appeal Act, 1907, s. 4, sub-s. 1. This jurisdiction gives larger powers to interfere with verdicts than had heretofore existed in criminal cases.

In addition to the rule of practice above mentioned, there are, with regard to certain offences, statutory provisions that no person shall be convicted upon the evidence of one witness unless such witness be corroborated in some material particular implicating the accused—e.g., the Criminal Law Amendment Act, 1885, ss. 2 and 3. In these cases the law is that the judge, in the absence of such corroborative evidence, must stop the case at the close of the prosecution and direct the jury to acquit the accused. Where no such statutory provision is applicable to the offence charged, and the evidence for the prosecution consists of the uncorroborated testimony of an accomplice or accomplices, the law is that the judge should leave the case to the jury after giving them the caution already mentioned.

As the rule of practice at common law was founded originally upon the exercise of the discretion of the judge at the trial, and, moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, "confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary": *Reg.* v. *Mullins* (1), per Maule J. Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice: *Rex* v. *Noakes*. (2) The difference of opinion has arisen in the main in reference to the question whether the corroborative evidence must connect the

(1) 3 Cox, C. C. 526, 531. (2) (1832) 5 C. & P. 326.

accused with the crime. The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, is it corroborative evidence ? There are some expressions to be found in the books which imply that it may be, and in *Rex* v. *Birkett* (1) the judges were of opinion that an accomplice did not require confirmation as to the person he charged, if he was confirmed as to the particulars of his story. The case is very imperfectly reported, and the evidence is not stated. It was not argued by counsel, but was stated verbally to a meeting of the judges by the judge who tried the case. There are other cases where it has been held that a conviction on such evidence could not be quashed by the Court, but the ratio decidendi is that as an accomplice is a competent witness and the jury thought him worthy of credit, the verdict was in accordance with law : *Rex* v. *Atwood* (2) ; *Rex* v. *Jones.* (3) There are other cases where it has been held that on such evidence the case cannot be withdrawn from the jury : *Rex* v. *Hastings* (4) ; *Reg.* v. *Andrews* (5), per Coleridge J. ; *Reg.* v. *Avery.* (6) After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *Reg.* v. *Stubbs* (7) by Parke B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime ; as we have already stated, that is unnecessary. It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation to the crime. Parke B. gave this

(1) (1813) R. & R. 251.
(2) 1 Leach, 464.
(3) (1809) 2 Camp. 131.
(4) (1835) 7 C. & P. 152.
(5) 1 Cox, C. C. 183.
(6) 1 Cox, C. C. 206.
(7) Dears. 555.

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opinion as a result of twenty-five years' practice; it was accepted by the other judges, and has been much relied upon in later cases. In *Rex* v. *Wilkes* (1) Alderson B. said: "The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence." In *Reg.* v. *Farler* (2) Lord Abinger C.B. said: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. . . . . It would not at all tend to shew that the party accused participated in it." In *Reg.* v. *Dyke* (3) Gurney B. said: "Although, in some instances, it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction." In *Reg.* v. *Birkett* (4) the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice, and to confirm it it was proved that a quantity of mutton corresponding in size with the sheep stolen was found in the prisoner's house. Patteson J. said: "If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient, . . . . but here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury."

These cases lead to the view expressed later by Parke B. in *Reg.*

(1) 7 C. & P. 272.
(2) 8 C. & P. 107.
(3) 8 C. & P. 261.
(4) 8 C. & P. 732.

v. *Stubbs* (1), and show that in his time, although there had been doubt in the past, the law as formulated by him was accepted as the correct opinion, and continued to be the law to the time of the passing of the Criminal Appeal Act, and in our judgment to the present day.

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, "implicates the accused," compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg.* v. *Birkett.* (2) Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice.

The decisions of this Court upon the nature of the corroboration required call for some examination, and it is because they do not always appear to be to the same effect that this Court was specially constituted in order that we might lay down rules for future guidance.

(1) Dears. 555. (2) 8 C. & P. 732.

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In *Rex* v. *Everest* (1) the Court said: "The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused." We think "tell the jury to acquit" should read "warn the jury of the danger of convicting." There is no statement in the report of the exact warning given by the judge. In *Rex* v. *Wilson* (2) there was an abundant caution, and the Court said: "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused." If this means that the judge should not warn the jury to require independent corroboration of some part of the story which implicates or involves the accused, it goes too far.

In *Rex* v. *Blatherwick* (3) the Court said: "*Everest* (4) goes too far. *Wilson* (2) is the correct statement of the law." We agree that *Everest* (4) goes too far in saying that the judge should direct the jury to acquit, but *Everest* (4) is the better statement of the law as regards the corroboration for which the jury should look.

In *Bradshaw* v. *Waterlow & Sons* (5) Pickford L.J., in the Court of Appeal, was of opinion that *Wilson's* (2) and *Blatherwick's* (3) cases showed "that it is not necessary to have corroboration directly implicating the accused, if the corroboration which exists supports the truth of the story as a whole." The learned Lord Justice was merely stating his view of these cases in regard to the case then before the Court. He found, however, that in fact there was corroboration directly implicating the accused in the case then under appeal, and it was, therefore, unnecessary to consider further the cases of *Everest* (4), *Wilson* (2), and *Blatherwick.* (3)

In *Rex* v. *Cohen* (6) the Court did not attempt to deal with the difference of opinion manifested by the decisions of *Everest* (4) and *Wilson* (2), but, as explained in *Rex* v. *Willis* (7), decided the case on the assumption that the more favourable view of the law to the appellant as laid down in *Everest's Case* (4) was right. The Court there said that it was the practice of this Court to require corrobora-

(1) 2 Cr. App. R. 130, 132.
(2) 6 Cr. App. R. 128.
(3) 6 Cr. App. R. 281.
(4) 2 Cr. App. R. 130.
(5) [1915] 3 K. B. 527, 534.
(6) 10 Cr. App. R. 101.
(7) [1916] 1 K. B. 933; 12 Cr. App. R. 44, 47.

tion before it could allow a conviction to stand. We did not intend to lay down such a rule of practice. It is too strongly expressed and is too general a statement; the correct view is that laid down earlier in the present judgment.

The latest case is *Rex* v. *Willis*. (1) The Court there stated: "Certain statutes provide that certain classes of evidence shall not be sufficient to support a conviction unless corroborated by some other material evidence implicating the accused; but where corroboration is required by the common law it is not subject to any such qualification." It follows from the law laid down in the present judgment that that is a correct view to the effect that the verdict of a jury properly warned would not be set aside merely because they had believed an accomplice without corroboration implicating the accused, but it must not be read as meaning that the corroboration need not be independent evidence implicating the accused.

The case of *Rex* v. *Cooper* (2) was referred to during the course of the argument. That case turned upon special facts relating to the medical testimony. It did not alter the law.

Now that we have stated the law to be applied in future cases, we trust that it will be unnecessary again to refer to the earlier decisions of this Court.

The question was discussed on the hearing of this appeal whether the evidence of an accomplice against two prisoners, corroborated as to one prisoner's participation in the crime, but not as to the other, can be regarded as corroboration with regard to both prisoners. We think the law is correctly stated by Alderson B. in *Reg.* v. *Jenkins*. (3) The learned Baron said: "Where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me it would be unjust to give it a general effect." The case of *Rex* v. *Jones* (4) may appear at first sight to be in the contrary direction, but, upon

(1) [1916] 1 K. B. 933; 12 Cr. App. R. 44, 47.
(2) (1914) 10 Cr. App. R. 195.
(3) 1 Cox, C. C. 177.
(4) 2 Camp. 131, 132.

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closer examination, we do not think that Lord Ellenborough intended to decide more than that when two prisoners are tried and convicted upon the evidence of an accomplice corroborated as to the one but not as to the other, the conviction of the other must nevertheless be regarded as a conviction which was good in law. Lord Ellenborough was upholding the rule of law that a conviction founded upon the evidence of an accomplice only could not be treated as bad in law. His Lordship said: "Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness."

We see no reason in principle why a different rule as to corroboration should apply to a prisoner tried with another, against whom there is corroborative evidence of the accomplice's story, from that applicable if the first prisoner had been tried alone. In that case the uncorroborated evidence of the accomplice would be admissible against him, but it would be the judge's duty to give the proper caution to the jury; and it would be equally incumbent upon the judge to give the warning to the jury when the prisoner is tried with another against whom there was corroboration of the accomplice's story. If the judge failed to give the warning, this Court would be bound to set aside the conviction. If the judge gave the warning, this Court would then have to consider all the circumstances of the case as already indicated.

The appeal stands dismissed.

*Appeal dismissed.*

Solicitor for appellant: *Freke Palmer.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

[IN THE COURT OF APPEAL.]

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*July* 18, 19, 29.

## INCE *v.* REIGATE EDUCATION COMMITTEE.

*Employer and Workman—Compensation—Accident arising out of Employment—Visiting Nurse—Direction by Employers to use Bicycle—Bicycle Accident—Abnormal Risk—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The applicant was employed as a visiting nurse by an education committee to visit children at their homes and was required by her employers to ride a bicycle provided by them for that purpose. Her duties necessitated her riding her bicycle from six to ten miles every day along one or other of the roads in her district, and the number of cases she visited averaged about 120 a month. Each visit usually occupied only a few minutes. On leaving a house where she had been visiting a child, in attempting to cycle round a cart and horse which were standing across the road her bicycle "skidded" and one of the wheels became locked in the back wheel of a passing cart, and she was thrown to the ground and seriously injured. The district in which the applicant's work lay was a residential rural district, and the road was an ordinary water-bound macadam road in fairly good condition :—

*Held*, that the accident did not arise out of the employment inasmuch as the applicant had failed to prove that it exposed her to exceptional risks beyond those to which ordinary bicycle riders were exposed.

*Read* v. *Baker* [1916] 1 K. B. 927 and *Dennis* v. *A. J. White & Co.* [1916] 2 K. B. 1 followed.

*Pierce* v. *Provident Clothing and Supply Co.* [1911] 1 K. B. 997 distinguished.

The difference in the views taken by the English and Scottish Courts with regard to the risks incurred by a workman where in the course of his employment he is required to ride a bicycle observed upon.

Appeal from an award of the judge of the Reigate County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was a visiting nurse in the employment of the respondents, the Reigate Education Committee. Her district comprised Reigate, Redhill, and Earlswood. It was her duty to visit at their homes children whose names had been sent in by the teachers to the doctor, and also to inspect certain schools. When she was appointed it was arranged that she should be

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provided with a bicycle, and the respondents paid for the hire of one selected by herself. Her duties necessitated her riding her bicycle from six to ten miles every day along one or other of the roads in her district, and the number of cases she visited averaged 120 per month, or about five per day. Each visit usually occupied only a few minutes. On March 13, 1915, she left a house where she had been visiting a child and was going along Earlswood Road. A cart and horse were standing across the road. She attempted to cycle round the cart, but before she had gained her proper position on the side of the road her bicycle "skidded" and one of the wheels became locked in the back wheel of a passing cart, and she was thrown to the ground and seriously injured. A week after the accident it was found necessary to amputate the thumb of her right hand. The respondents paid her full wages up to the end of March, and from March to the end of August half-wages, 13*s.* 6*d.* per week. In September, 1915, she resumed work of a lighter character with the respondents.

The applicant instituted the present proceedings for compensation.

It appeared from the evidence of the borough surveyor that the width of the Earlswood Road was 19 feet 8 inches and that the road was an ordinary water-bound macadam road in fairly good condition. There was ordinary district traffic from the Brighton Road into Earlswood. The district was a residential rural district.

The county court judge made an award in favour of the applicant for a declaration of liability. In giving his reasons he said that he was of opinion that the evidence quite clearly established that the applicant was exposed to abnormal risk out of which the accident arose, inasmuch as she was compelled to be travelling many hours a day on her bicycle over a large area, through which the main London and Brighton Road ran, and that the risk was enhanced by her having to be constantly dismounting and remounting after each visit she made.

The respondents appealed.

*Ellis Hill*, for the appellants. The accident to the respondent did not arise out of her employment. The learned county court judge relied on *Pierce* v. *Provident Clothing and Supply Co.* (1), but

(1) [1911] 1 K. B. 997.

in that case the use of the bicycle exposed the workman to exceptional risks, and that is not the case here. That case followed *M'Neice* v. *Singer Sewing Machine Co.* (1), which is a Scotch case, and in Scotland a broader view has been taken as to street risks being incidental to the employment: *Bett* v. *Hughes.* (2) Those cases are not binding on this Court: *Hadwin* v. *Shepherd* (3); *Sheldon* v. *Needham* (4); *Dennis* v. *A. J. White & Co.* (5)

There is here no evidence to support the findings of the learned county court judge. There is no abnormal risk in riding a bicycle six or ten miles or in mounting and dismounting four or five times a day. The present case falls within *Read* v. *Baker* (6) and *Dennis* v. *A. J. White & Co.* (5)

[PICKFORD L.J. referred to *Clayton* v. *Hardwick Colliery Co.* (7)]

[He also referred to *Herbert* v. *Samuel Fox & Co.* (8), *Greene* v. *Shaw* (9), and *Chapman* v. *Owners of S.S. John W. Pearn.* (10)]

*P. T. Blackwell* and *G. W. Blackwell*, for the respondent. It is submitted that the accident arose entirely out of the employment in which the respondent was engaged. In *Craske* v. *Wigan* (11) the Master of the Rolls said that in order that the accident should arise out of the employment it must happen when the applicant is doing something in the course of his employment. The question in each case is one of fact. *Trim Joint District School Board of Management* v. *Kelly* (12) supports the view that where the matter is one depending on varying circumstances of time and degree the question is one of fact. Here the learned county court judge has found as a fact that the respondent was exposed to abnormal risk, and this Court will not disturb that finding. This is an a fortiori case to *Pierce* v. *Provident Clothing and Supply Co.* (13), which should be followed. The fair test as to whether the respondent was exposed to abnormal risk is to compare her case with that of nurses who are not compelled to ride a bicycle. *Dennis* v. *A. J. White &*

(1) 1911 S. C. 12; 48 S. L. R. 15.
(2) (1915) 52 S. L. R. 93; 8 B. W. C. C. 362.
(3) (1916) 9 B. W. C. C. 60.
(4) (1914) 7 B. W. C. C. 471.
(5) [1916] 2 K. B. 1.
(6) [1916] 1 K. B. 927.
(7) (1914) 7 B. W. C. C. 643.
(8) [1916] 1 A. C. 405.
(9) (1911) 5 B. W. C. C. 573.
(10) [1916] W. C. & Ins. Rep. 47; 9 B. W. C. C. 224.
(11) [1909] 2 K. B. 635.
(12) [1914] A. C. 667, 711.
(13) [1911] 1 K. B. 997.

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*Co.* (1) is in the respondent's favour, because the Court there held that the question whether the accident did or did not arise out of the employment was one of fact upon which the decision of the county court judge was final.

[WARRINGTON L.J. You cannot pass over the extremely careful judgment of Lord Atkinson in *Herbert* v. *Samuel Fox & Co.* (2)]

In that case there was a difference of opinion among the learned Lords.

[WARRINGTON L.J. What is in your favour is the finding of the learned county court judge that there was abnormal risk, but then unfortunately for you he has given his reasons for so finding.

PICKFORD L.J. referred to *Bett* v. *Hughes.* (3)]

It is submitted that the respondent was exposed to abnormal risks to which an ordinary bicyclist would not be.

*Ellis Hill* in reply. There is no evidence to support the view that the respondent was subject to abnormal risk. The view of the English and not that of the Scottish Courts should be followed.

[LORD COZENS-HARDY M.R. referred to *Martin* v. *Lovibond & Sons.* (4)]

*Cur. adv. vult.*

July 29. LORD COZENS-HARDY M.R. read the following judgment:—This appeal raises a question of general interest as to the conditions in which a bicycle accident may establish a claim to compensation under the Workmen's Compensation Act, 1906.

Whatever may have been the case in the early days of bicycling, there is no doubt that bicycles are now used by young and old of both sexes as a recognized ordinary means of locomotion in rural and suburban districts, if not also in densely populated cities. The idea of risk or danger is not associated with a modern bicycle. There may be circumstances connected with a particular road which render it dangerous, such as bad gradients or level crossings, but the presumption is that a bicyclist on an ordinary road is doing what is safe. An accident may happen, but a pedestrian is not exempt from accidents. It is settled in this country, though the

(1) [1916] 2 K. B. 1.
(2) [1916] 1 A. C. 405.
(3) 52 S. L. R. 93; 8 B. W. C. C. 362.
(4) (1914) 7 B. W. C. C. 243.

Scottish Courts take a different view, that a risk of the road or street does not entitle a pedestrian to compensation from his employer, and I cannot see why a bicyclist should be in a better position. Even a pedestrian who is *specially* exposed to risk by reason of the nature of his employment, such as a sandwichman, who is walking all day long in the streets, might, I imagine, obtain compensation. So, a bicyclist who has to spend practically the whole day in the streets of a busy town may obtain compensation. This was decided by this Court in *Pierce* v. *Provident Clothing and Supply Co.* (1), where the man was a collector or canvasser in Birkenhead. On the other hand, it has been decided by this Court that a clerk who was permitted to go on a bicycle on his master's business from Rochester to Northfleet could not obtain compensation for injury sustained by a collision on the main road: *Read* v. *Baker* (2); and see *Dennis* v. *A. J. White & Co.* (3) and the cases there cited.

The applicant is a professional nurse. She was engaged by the Reigate Education Committee as visiting nurse for their district. Her duties were to visit children as directed by the doctor, and to inspect the schools. She was told that she would have to bicycle, and the committee hired a bicycle for her. She had to travel "six to ten miles every day," and the number of cases visited averaged 120 per month, say five a day. Each visit took usually a few minutes. On March 13, 1915, she left a house where she had been visiting a child and was going along Earlswood Road. A cart and horse were standing across the road. She proposed to cycle round the cart, but before she had gained her proper position on the side of the road her bicycle skidded and her wheel locked into the back wheel of a passing cart, and her hand was seriously injured. The education committee have treated her with liberality, paying her full wages and half-wages while denying their statutory liability. She has now recovered. The county court judge made a declaration of liability and ordered the committee to pay costs.

If the county court judge had simply stated that she was exposed to "abnormal risk," it might have been difficult for us to interfere; but he assigns three reasons, two of which are not supported by

(1) [1911] 1 K. B. 997. (2) [1916] 1 K. B. 927.
(3) [1916] 2 K. B. 1.

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any evidence, and the third of which seems to me irrelevant. He says, firstly, "she was compelled to be travelling many hours a day on her bicycle." There is no evidence of this. She could not spend many hours a day in riding "six to ten miles." He says, secondly, "the risk was enhanced by her having to be constantly mounting and remounting after each visit she made." Again there is no evidence of this. He says, thirdly, "the main Brighton Road runs across the area." This is true; but it seems to me irrelevant.

In these circumstances I think it is competent for us to consider whether the applicant was exposed to abnormal risk. In my opinion she was not. The borough surveyor, who produced the Ordnance map, says that the area is a "residential rural district," and that Earlswood Road is an ordinary macadam road in fairly good condition. In all this there is nothing special or peculiar. It seems to me that riding from six to ten miles a day in such an area did not expose her to greater risk than ordinary bicyclists run, and that her employers are not bound to pay her statutory compensation.

In my opinion the appeal must be allowed and an award made in favour of the employers.

PICKFORD L.J. read the following judgment:—In this case the county court judge has made a declaration of liability in favour of the applicant, and the respondents appeal.

The applicant was employed by the respondents as a visiting nurse. She was told that to make visits she would have to bicycle all over the area of Reigate, Redhill, and Earlswood, and the respondents paid for a bicycle which she was to use for the purpose. She said that she rode from six to ten miles a day and was riding her bicycle at the time of the accident in pursuance of her instructions. She had to make 120 visits a month, and of course had to get off and on her bicycle at each visit. The district was described as a residential rural district. The accident, the details of which are not, I think, important, happened in Earlswood Road, a road 19 feet 8 inches wide, described as an ordinary water-bound macadam road in fairly good condition, with ordinary district traffic from the Brighton Road into Earlswood. The main Brighton Road passes through the district. The question is whether this accident arose out of her employment.

There are several cases as to the position of workmen whose employment requires them to ride bicycles, the principal and most important decisions being *M'Neice* v. *Singer Sewing Machine Co.* (1), *Pierce* v. *Provident Clothing and Supply Co.* (2), *Bett* v. *Hughes* (3), and *Dennis* v. *A. J. White & Co.* (4)

The Scottish and the English Courts have taken a different view on this matter.

I think that the Scottish view is fairly expressed in this way—that the fact of being required to use a bicycle in his employment exposes the workman to a risk to which the ordinary member of the public is not exposed, that is the risk of riding a machine amongst traffic which the ordinary person need not do unless he likes, and that it is not necessary to show that he has to ride it under circumstances which make the riding of a bicycle exceptionally risky : see the Lord President in *Bett* v. *Hughes* (5) and Lord Ormidale (6) in the same case.

This is not the view which has been taken by the English Courts (see especially Phillimore L.J. in *Dennis* v. *A. J. White & Co.* (7) ), and I think that the English view is very clearly expressed in the judgment of Lord Johnston in *Bett* v. *Hughes.* (8) He says this (he is expressing his own opinion and his agreement with the English view) : " If I may revert to a matter to which I have already referred, viz., the statute, and to the necessity of the employee in support of his claim satisfying the arbitrator that the injury was caused by accident both ' arising out of ' and ' in the course of ' his employment, and the danger of reducing either of these conditions to a mere synonym of the other, I would shortly state my own opinion as to the effect of the statutory provision when applied in present or similar circumstances. That the accident should ' arise out of ' the employment it must be occasioned by a risk incidental to the employment. A risk incidental to the employment may also be a risk common to the public. That a risk common to the public should be a risk incidental to the employment the

(1) 1911 S. C. 12 ; 48 S. L. R. 15.
(2) [1911] 1 K. B. 997.
(3) 52 S. L. R. 93.
(4) [1916] 2 K. B. 1.
(5) 52 S. L. R. 94.
(6) Ibid. 97.
(7) [1916] 2 K. B. 5.
(8) 52 S. L. R. 96.

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employee must be exceptionally exposed by his employment to the common risk. If 'exceptionally,' then there must arise a question of degree." This is the view which of course I must apply sitting in an English Court, and the question is whether there is any evidence to support the finding of the county court judge. Two parts of his judgment have been much criticized, firstly, his finding that the applicant spent many hours each day on her bicycle, and, secondly, that the risk was increased by her having to get on and off several times.

The first finding is certainly, I think, without foundation. It could not be the fact that, even allowing for the time spent in calls, the applicant took many hours to cover six to ten miles.

With regard to the second, I should myself attach little or no importance to it; but I think it possible that other persons might think that, if there were much traffic about at the time, having to get on and off several times did add to the risk. But on the evidence as to the number of calls per month, it only occurred about four times a day, which is not an exceptional number. I think that the finding of many hours' bicycling must be disregarded as being unsupported by evidence, and the actual facts disclosed in the evidence considered. I think that it is involved in the decisions of the English Courts that, in order to succeed, the applicant must show not only that the riding of a bicycle in the course of her duty involved her in dangers beyond those to which all members of the public were exposed, but that she must go further and show that she rode under such exceptional circumstances that the risks were beyond those to which ordinary bicycle riders were exposed. I should certainly not have found that such exceptional risk was established, although there was risk sufficient to satisfy the test applied by the Scottish Courts, and the only doubt I have had is whether there may not be said to be some evidence to support the finding of the county court judge on the ground suggested by Lord Ormidale in *Bett* v. *Hughes* (1), where he says this: "if it were necessary for the respondent to show that he was because of the nature of his employment specially exposed to the ordinary dangers of the road, then I should be prepared to hold on the facts stated that because of the number of times he had to go to the post office he

(1) 52 S. L. R. 97.

was exposed to the risks of the road to a degree beyond the normal." In that case he was dealing with a coachman who went to post his mistress's letters, and had to go either once or twice a day when his mistress was at home, and at longer intervals when she was not at home. I do not think that evidence of riding six to ten miles a day on ordinary roads with ordinary traffic in a rural residential district is evidence of exposure of a bicyclist to exceptional risk, and therefore I think that the appeal must be allowed.

I hope that the question whether the view taken by the English Courts or that taken by the Scottish Courts is right will soon be determined, as it cannot be satisfactory that the rights of an applicant to compensation under an Act applying to the whole kingdom shall depend upon whether the proceedings are taken on one or the other side of the border.

WARRINGTON L.J. read the following judgment:—The applicant in this case while riding her bicycle along a road called the Earlswood Road in the neighbourhood of Reigate sustained an injury by accident. The county court judge has held that the accident arose out of her employment and has made a suspensory award. The employers appeal from that decision. The applicant was a nurse in the employment of the Reigate Education Committee. It was her business to visit in the area including Reigate, Redhill, and Earlswood certain school children at their homes and also to inspect certain schools. When she was engaged it was arranged that she should be provided with a bicycle, and the employers paid the hire of one selected by herself. Her duties involved riding her bicycle from six to ten miles every day along one or other of the roads in her area. There seems to be no special feature about the roads. I gather that they are of the ordinary suburban or country type, except that the area is traversed by the main London road. The county court judge expresses his reasons in the following terms: "I was of opinion that the evidence quite clearly established that the applicant was exposed to abnormal risk out of which the said accident arose, inasmuch as she was compelled to be travelling many hours a day on her bicycle over a large area, through which the main London and Brighton road runs, and that the risk was enhanced by her having to be constantly dismounting and remounting

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after each visit she made." If the learned judge had found simply that the applicant was exposed to abnormal risk, I think the only question we should have to consider would be whether there was evidence by which such finding could be supported, because that would then be a finding of fact, and the conclusion, namely, that the accident arose out of the employment, would be the proper legal inference to draw from that fact. The learned judge has in his reasons given certain grounds as those on which he has arrived at that conclusion. The first of those grounds, namely, that she was compelled to be travelling many hours a day on her bicycle, is not in accordance with the facts. As to the second, though it is true that the main London and Brighton road runs through the area, there was no evidence showing that that constituted any special risk, or that her duties compelled her to incur any such risks, nor was there any evidence in support of the suggestion as to enhanced risk by constantly mounting and dismounting, nor does there in the nature of things seem to be anything to support that view. I think, therefore, that the finding as to abnormal risk is rather an inference to be drawn from facts which were not proved than a finding of fact in itself. But, even if I am wrong in this view, I am prepared to hold that in this case there was no evidence on which the county court judge could properly come to the conclusion that there was an abnormal risk sufficient to lead to the inference that the accident arose out of the employment.

The result of the English cases, and particularly of *Pierce* v. *Provident Clothing and Supply Co.* (1) and *Dennis* v. *A. J. White & Co.* (2), is that in these bicycle cases it is necessary for the applicant to prove that from the nature of his employment involving, as it is assumed to do, the use of a bicycle he incurred more risk than that incurred by the general public who ride bicycles. *Pierce's Case* (1) is on one side of the line, and I think that the ground of the decision was that the man's employment took him to such an extent into places involving special risk to a cyclist that the risk he ran might well be held to be not that run by an ordinary rider of a bicycle. *Dennis's Case* (2), on the contrary, was on the other side, and Phillimore L.J. in his judgment in that case clearly shows, I think, the distinction between the two classes of cases. He

(1) [1911] 1 K. B. 997. (2) [1916] 2 K. B. 1.

says (1): "I think that those decisions show that unless the man's ordinary employment brings him so constantly into the streets as to expose him, by reason of his employment, to a special danger from street risks,—what one might call the cumulative street risk,—then the risk which he undertakes is an ordinary street risk shared by him with ordinary members of the public. It is not an accident arising out of the employment if the man is proceeding in a vehicle, whether under orders or lawfully without orders, in the part of the street where vehicles ordinarily travel, although he may be thereby more exposed to contact with other vehicles than if he were walking. I think that the decisions further show that, although there are peculiar dangers inherent to travelling on a bicycle, such as a side-slip, or possibly an increased liability to collision, it is none the less the kind of vehicle which ordinary members of the public use, even in the streets of London, and is not to be regarded as a specially dangerous vehicle."

There was really in this case no evidence at all in support of the suggestion that the applicant was exposed to any special risk not shared by the many hundreds of people who must be riding bicycles daily on the roads in question. I am aware that in some Scotch cases, and in particular in *Bett* v. *Hughes* (2), some members of the Court of Session in Scotland have taken a view more favourable to the workman than that expressed above; but those cases are not binding upon us. We are bound to follow the decisions of the English Courts.

For these reasons I think that the appeal ought to be allowed and an award made in favour of the respondents.

*Appeal allowed.*

Solicitors: *Watson, Sons & Room; W. B. Blackwell & Co.*

(1) [1916] 2 K. B. 5. (2) 8 B. W. C. C. 362.

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[IN THE COURT OF APPEAL.]

## COX *v.* GEORGE TROLLOPE & SONS.

*Employer and Workman — Compensation — Basis of Calculation — "Average weekly earnings"—Earnings varying according to Season —Shortness of Period of Employment—Scaffolder—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 1 (*b*) *and* 2 (*a*).

The applicant was employed by the respondents as a scaffolder at a wage of 8½*d.* an hour. On January 27, 1916, he met with an accident arising out of and in the course of his employment and was totally incapacitated. At the time of the accident he had been in the employment of the respondents for seven weeks, and his average weekly earnings during that period amounted to 1*l.* 7*s.* 8½*d.* There was evidence that scaffolders were usually employed for short periods only by different employers, but that they could generally obtain employment throughout the whole year. They worked longer hours in summer than in winter and consequently earned more money. The applicant estimated his average weekly earnings for a year at 1*l.* 15*s.* 10*d.* The county court judge held that, having regard to the shortness of the time during which the applicant had been in the respondents' employment and to the fact that the weekly earnings varied in summer and winter, it was impracticable within the proviso to par. 2 (*a*) of Sched. I. to the Workmen's Compensation Act, 1906, to compute fairly the rate of the applicant's remuneration by reference to his earnings during the seven weeks' employment, and he accordingly awarded compensation at the rate of 17*s.* 11*d.* a week by reference to the average weekly earnings of a person in the same grade employed in the same class of employment and in the same district :—

*Held*, that the words "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated" at the beginning of par. 2 (*a*) were the dominant guiding words of the paragraph and were quite sufficient to justify the county court judge in adopting the course he did.

*Perry* v. *Wright* [1908] 1 K. B. 441 and *Carter* v. *John Lang & Sons*, 1908 S. C. 1198 ; 1 B. W. C. C. 379, applied.

*Godden* v. *W. Cowlin & Son* [1913] 1 K. B. 590 explained.

Appeal from an award of the judge of the City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was employed by the respondents, a firm of builders

and contractors, as a scaffolder at a wage of 8½*d.* an hour. He entered their employ on December 10, 1915, and met with an accident on January 27, 1916, by which he was totally incapacitated. It was admitted that the accident arose out of and in the course of the employment, and the sole question was what was the amount of the compensation to which he was entitled. Owing to absence due to illness and to occasional holidays the period during which he was actually employed by the respondents was seven weeks, and his average weekly earnings during that period amounted to 1*l.* 7*s.* 8½*d.* It appeared from the evidence that scaffolders were usually employed for short periods by different employers, but that they could generally obtain employment throughout the whole year. The hours of work were fifty hours per week in the summer as against forty-four hours per week in the winter. The applicant put his wages as a scaffolder for fifty-two weeks at an average of 1*l.* 18*s.* per week, but in cross-examination he admitted that he would probably lose three weeks during changes or other incidents of employment, and that in that case his average weekly earnings would be 1*l.* 15*s.* 10*d.*

The question depended on the construction of Sched. I., pars. 1 (*b*) and 2 (*a*), of the Workmen's Compensation Act, 1906. (1)

(1) Workmen's Compensation Act, 1906, Sched. I.:

"(1.) The amount of compensation under this Act shall be . . . .

"(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound . . . ."

"(2.) For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed:—

"(*a*) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute

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The judge of the City of London Court held that it was impracticable within the proviso to par. 2 (*a*) of the schedule to compute fairly the rate of remuneration of the applicant with reference to his earnings during the seven weeks, having regard to the fact that the average during the twelve months previous to the accident was the dominant principle to be applied, and that the average weekly earnings varied in summer and winter. He therefore awarded compensation at the rate of 17*s.* 11*d.* a week by reference to the average weekly earnings of a person in the same grade employed in the same class of employment and in the same district.

The employers appealed.

*Ellis Hill*, for the appellants. The learned county court judge was wrong in holding that it was impracticable under par. 1 (*b*) for him to give a fair compensation to the applicant if he were merely to take the limited period during which he was actually employed. The words "rate per week at which the workman was being employed" in par. 2 (*a*) of the schedule mean the rate at which he was being remunerated at the date of the accident. Unless there is anything abnormal in the terms of the employment, the period of the employment must be taken as the basis of the calculation. The county court judge had no right to take another period when the man was being remunerated by a different employer.

[Lord Cozens-Hardy M.R. referred to *Perry* v. *Wright*. (1)]

That case is, if anything, in the appellants' favour. Where, as here, the facts of the case bring it within the words of the schedule, the Court is bound by the schedule, and must not adopt another period because it thinks it gives a fairer result. The dominant period is the period of the employment. The point is of very great importance to insurance companies, who fix their premiums accord-

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the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

(1) [1908] 1 K. B. 441.

ing to the rate of the wages paid. The present decision, if upheld, will lead to an alteration in the rates of the premiums. If there is a substantial period of employment it is not open to the Court to refuse to make the calculation on the ground that it is impracticable. Provided that there are two weeks' employment an average can be arrived at. Shortness of time means where there are less than two weeks. It is impossible to say in the present case that the period of actual employment is too short: *Godden* v. *W. Cowlin & Son.* (1) If the Legislature had intended that the period of twelve months should be taken as the normal period it would have said so. [He also referred to *Lysons* v. *Andrew Knowles & Sons* (2) and *Giles* v. *Belford Smith & Co.* (3)]

[Pickford L.J. referred to *Cue* v. *Port of London Authority.* (4)]

*Rigby Swift, K.C.*, and *E. F. Lever*, for the respondent. The question was one of fact for the decision of the county court judge, and he has found that it was impossible to arrive at the average weekly earnings by taking the period of seven weeks. The schedule to the present Act differs materially from the schedule to the Act of 1897, and the decisions on the latter schedule are therefore not applicable. On the true reading of the schedule it is submitted that the period of twelve months is the natural basis for arriving at a normal week's earnings. Par. 1 (*b*) does not confine the county court judge to a mathematical calculation. At the most there were here only seven weeks upon which to base the calculation, and the county court judge was entitled to say, as he did, that they constituted too short a period from which to arrive at a fair weekly average and that the proper period to take was twelve months. He did not purport to lay down any general rule, but merely held that under the circumstances of the case it was impracticable to arrive at a fair rate of remuneration by taking the period of seven weeks. The question is really whether the Court is to arrive at the truth or at a mathematical result. The case is concluded by the observations of the Master of the Rolls and Fletcher Moulton L.J. in *Perry v. Wright* (5) and by *Carter* v.

(1) [1913] 1 K. B. 590.
(2) [1901] A. C. 79.
(3) [1903] 1 K. B. 843.
(4) [1914] 3 K. B. 892.
(5) [1908] 1 K. B. 441.

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*John Lang & Sons.* (1) [They also referred to *Priestley* v. *Port of London Authority.* (2)]

*Ellis Hill* replied.

Lord Cozens-Hardy M.R. The applicant here admittedly met with an accident arising out of and in the course of his employment and was totally incapacitated. The question is, what is the amount to which he is entitled by way of compensation? The workman was a scaffolder, which I suppose is a recognized term for a man who is specially skilled in erecting scaffolds, as distinguished from carpenters or builders. The time during which he is engaged on any particular job will vary with the size of the building, but generally speaking the job does not last long. In the present instance the workman had been employed by the appellants for seven weeks. Those seven weeks were during the winter, when the days were short. The payments to scaffolders are $8\frac{1}{2}d.$ per hour. The man's earnings would therefore depend entirely upon the number of hours he was at work.

Two views were put before the learned county court judge. One view was that as this man had been engaged by the same employer for seven weeks at the date of the accident, all that had to be done was to add up his total earnings from that employer for the seven weeks and divide by 7 and so get his average weekly earnings under the Act. And it was also said that only where it was impracticable to do that simple addition and division sum any method outside par. 1 (*b*) of the schedule could be resorted to. It is said, therefore, that the learned county court judge was wrong in saying that it was impracticable to compute the compensation as directed in par. 1 (*b*), and that he was therefore not at liberty, as he thought he was, to decide the case with reference to par. 2 (*a*). In my opinion these two paragraphs, difficult as they both are to construe, have been construed by this Court for a number of years now, certainly for more than eight years, in a manner which it is not open for us now to depart from.

The material words of par. 1 (*b*) are these: [His Lordship read them and continued:] If the schedule had stopped there it would have been a short answer in this case to have said "the workman

(1) 1908 S. C. 1198. (2) [1913] 2 K. B. 115.

has been engaged for seven weeks by the same employer, and that is sufficient." But then you have to go to par. 2, which gives certain rules for computing "earnings" and "average weekly earnings." As has been said more than once in this Court, the dominant principle, the dominant rule, in these cases is to be found in the opening words of par. 2 (*a*): "average weekly earnings" (these are the crucial words) "shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." That cannot, it seems to me, mean that they are to be computed simply by an arithmetical calculation. What you have to do is something much more difficult than the mathematical computation. The mathematical computation is the only thing that has to be made, I agree, if the man has been twelve months with the same employer. There you are told to do the sum without having regard to anything more or less than the earnings during the twelve months; and the average weekly earnings thus arrived at are to be taken as final and conclusive. When, however, the employment is for less than a year the average weekly earnings are to be ascertained or computed "in such manner as is best calculated to give the rate per week at which the workman was being remunerated." There are several provisoes to that, but the only one that is material is in clause (*a*): "Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had"—not "must be had": it is an enabling clause—"to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

These two paragraphs were elaborately and carefully considered by this Court in *Perry* v. *Wright*. (1) I do not propose to read again my judgment in that case, or the judgment of Fletcher Moulton L.J.; but it is quite clear that I did not think that a mere

(1) [1908] 1 K. B. 441.

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mathematical calculation was all that could be required. I instanced the case of an agricultural labourer who happens during the portion of the year when the accident takes place to be earning comparatively high wages, as for instance in the middle of harvest, and I said that it was not the test simply to look at what he was earning at the date of the accident, but that if he had not been in the employment for twelve months or for a period sufficiently long to give the normal rate of remuneration you must work on the second part of clause (*a*). Fletcher Moulton L.J. seems to me to take precisely the same view.

The view which I expressed there was repeated in *Cue* v. *Port of London Authority* (1), and I do not desire in any way to resile from that. Very shortly after the decision in *Perry* v. *Wright* (2) the matter came before the Scottish Courts in *Carter* v. *John Lang & Sons*. (3) The Lord President in that case examined our decision in *Perry* v. *Wright* (2) and adopted the language and the principles which we there endeavoured to lay down, and said (4): "The first observation I have to make is that I entirely agree with the Master of the Rolls and Moulton L.J. (5) in the remark which they both make that the leading proposition in these somewhat complicated sub-sections is the one at the beginning—that the average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. In other words you are as far as possible to cut yourself loose from what I may call the circumstances of the moment"—that is the date of the accident—"and to take a broad view of the matter in order to get truly at what the workman was in the habit of earning week by week." That is merely putting in other words what I endeavoured to say in *Perry* v. *Wright*. (2)

There have been other cases in which the same point has been raised. I am not aware of any decision which cuts down or qualifies the view which I have taken. Certainly the case of *Godden* v. *W. Cowlin & Son* (6), which was called to our attention, is in no way

(1) [1914] 3 K. B. 892.
(2) [1908] 1 K. B. 441.
(3) 1908 S. C. 1198; 1 B. W. C. C. 379.
(4) 1908 S. C. 1203; 1 B. W. C. C. 385.
(5) [1908] 1 K. B. 451, 456.
(6) [1913] 1 K. B. 590.

inconsistent with that. That was the case where a carpenter who had been in Canada for some years came back and took a short job with his old master. I say "a short job" because it was common knowledge that he was going back to Canada and that he had taken a passage by a particular steamer which was sailing a few months later. In those circumstances the learned county court judge held that the period of nine weeks during which he had been employed was a sufficient period for the purpose of computing compensation. This was based entirely upon the fact that to the knowledge of both parties the engagement was not one in which the possibility of a twelve months' employment existed, but was one which was only to last until the workman started back for Canada. I do not think that there is a single word in that case which has any bearing upon the present case; certainly it has not any bearing adverse to the view which I have taken.

Whose duty is it to say whether it is impracticable to compute the compensation by reference to the workman's actual earnings in the employment? I think it is the business of the county court judge; and if he has not misdirected himself upon that point it is not for us to interfere. If Mr. Ellis Hill's contention on behalf of the employers was right, there was an error of law on his part; but I do not think that this was so, and in my opinion we ought not to interfere.

I do not think that it is necessary to base my judgment upon one ground which rather impressed the learned county court judge. He seems to have thought that twelve months is the prima facie period to which regard has to be had in every case. That may be so: I am not prepared to say that it is not; but I do not think that it is necessary to consider whether that is so or not. I prefer to base my decision upon the words at the beginning of par. 2 (*a*) as being the dominant guiding words. That, I think, is quite sufficient to justify what the learned judge did here. He gave the man the benefit of the good season as well as the winter season and avoided saying that because this accident happened in the winter compensation could only be computed on the footing that the average earnings of the winter were the earnings of the twelve months. I think if the contrary view were taken the result would be sometimes very unfair to the man and sometimes very unfair to the master,

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and, more important still, that it would not be in accordance with the language of the Act itself.

In my opinion the appeal fails and must be dismissed.

Pickford L.J. I agree. I think that the case is governed by authority. I do not mean by that that there is a direct decision upon the point, but that the reasoning in the cases to which reference has been made applies here. Under those circumstances I think that it is quite unnecessary to consider what conclusion I might have come to if I had not been assisted by the authorities.

Warrington L.J. I agree. I also think that the case is completely concluded by the observations made by the Master of the Rolls and Fletcher Moulton L.J. in the case of *Perry* v. *Wright* (1) to which we have been referred, and also by the very carefully considered judgments of the Lord President and Lord M'Laren in *Carter* v. *John Lang & Sons* (2), delivered very shortly after the decision in *Perry* v. *Wright* (1) and after a thorough investigation of the judgments in that case. I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*
Solicitor for respondent: *Leonard Bingham.*

(1) [1908] 1 K. B. 441. (2) 1908 S. C. 1198; 1 B. W. C. C. 379.

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[IN THE COURT OF APPEAL.]

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*July* 20, 21, 29.

## PYPER *v.* THE MANCHESTER LINERS, LIMITED.

*Employer and Workman—Compensation—Ship's Stoker—Death from Heat-Stroke—"Injury by accident"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A seaman employed as a stoker on board a ship died from heat-stroke while going through the Red Sea. For four or five days before his death he had complained of the heat, which was admittedly excessive, and although he felt ill he continued working, being persuaded to do so in order to lessen the strain upon his fellow-workers. On the fifth day he collapsed while at work in the stokehold, and was taken up on deck, where he died. Upon an application by his widow against the owners of the ship for compensation under the Workmen's Compensation Act, 1906 :—

*Held*, that his death was not the result of an "injury by accident" within the meaning of the Act, and that no compensation was payable.

*Ismay, Imrie & Co.* v. *Williamson* [1908] A. C. 437 ; 1 B. W. C. C. 232 ; *Maskery* v. *Lancashire Shipping Co.* (1914) 7 B. W. C. C. 428 ; *Morgan* v. *Owners of S.S. Zenaida* (1909) 2 B. W. C. C. 19 ; *Sheerin* v. *Clayton & Co.* [1910] 2 I. R. 105 ; and *Brintons, Ld.* v. *Turvey* [1905] A. C. 230 distinguished.

Appeal from an award of the judge of the Manchester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of William Pyper, who died on board the ship *Manchester Port*, belonging to the respondents, while engaged in their employment as a fireman and trimmer on board that vessel. His death took place in June, 1915, while the ship was navigating the Red Sea, where there was excessive heat. In the particulars appended to the original application for arbitration the nature of the injury to the deceased was described as "Heat-stroke and exhaustion on the 2nd, 3rd, 4th, 5th, and 6th of June, 1915, death taking place on the latter date." This was afterwards, by leave of the county court judge, amended so that it read : "Heat-stroke. Died June 6th, 1915."

It appeared from entries in the ship's log and from the evidence of one of the crew named Mabbott that for some four or five days

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prior to his death Pyper was complaining of the excessive heat while at his work in the stokehold. On the day of his death he worked for about four hours and was so exhausted that he had to lie down on the coal. He was given some stimulating medicine, but eventually he was taken on deck, where he collapsed and died. It also appeared that he had been persuaded to keep on at his work and do what he could as his ceasing to work would make it hard for the rest of the men, who were also suffering from the heat. After the death the ship entered the port of Perim, where the body was taken ashore and buried. In the list of deaths contained in the ship's papers the cause of death was entered as "heat-stroke." An inquiry was held at Perim by Captain Hutchinson, a magistrate and Assistant Resident, who in his report stated the cause of death to be heat-stroke; and in the certificate of death which was put in at the hearing of the arbitration the cause of death was similarly stated.

In his judgment the county court judge, after referring to this certificate, said that the word "stroke" in itself implied something sudden, and that according to medical science "heat-stroke" was regarded as being "traumatic" and not "idiopathic." He decided the case on the entries in the log, the certificate of death, and the testimony of the seaman Mabbott, and made an award in favour of the applicant.

During the hearing a question arose as to the admissibility in evidence of certain depositions of fellow-seamen and a report of the Consular officials who held an inquiry at Aden. The depositions were taken in conformity with s. 691 of the Merchant Shipping Act, 1894, and it was contended that they were rendered admissible by s. 7, sub-s. 1 (*c*), of the Workmen's Compensation Act, 1906. The county court judge, while expressing his opinion that the evidence in question was admissible, as stated above decided the case without reference to it.

The employers appealed against the award on the ground (inter alia) that the county court judge was wrong in law in holding that the death of Pyper resulted from injury by accident.

*Greaves Lord*, for the appellants. This case is not covered by *Ismay, Imrie & Co.* v. *Williamson.* (1) That was an isolated case

(1) [1908] A. C. 437; 1 B. W. C. C. 232.

of exposure to heat. Where a man has to work in a hot climate, with the result of daily increasing exhaustion followed by death, there is no "injury by accident." There is nothing unexpected in such an occurrence, and it cannot be considered as accidental. The distinction pointed out in *Coe* v. *Fife Coal Co.* (1) applies here. All the men employed at the work were suffering from the excessive heat, and Pyper collapsed after a long period of exposure to it. In *Glasgow Coal Co.* v. *Welsh* (2) there was exceptional exposure on one occasion, and it was possible to fix the time at which the untoward thing happened: see also *Maskery* v. *Lancashire Shipping Co.* (3) Pyper died from gradual exhaustion brought about by continued exposure to extreme heat, and there was no element of "injury by accident." The county court judge has taken the certificate of death from heat-stroke as conclusive of the existence of an accident. He was misled by the statement in the head-note of *Ismay, Imrie & Co.* v. *Williamson* as reported in 1 B. W. C. C. 232 with regard to heat-stroke being "traumatic" and not "idiopathic." That statement does not appear in the *Law Reports* nor in any of the judgments of the Court.

*Cyril Atkinson*, K.C., and *Eastham*, for the respondent. "Heat-stroke" implies something more or less sudden in the way of collapse consequent upon exposure to extreme heat. This case comes well within the authorities as to heat-stroke. It is a case of sudden death arising from exceptional exposure to extreme heat, and is covered by *Maskery* v. *Lancashire Shipping Co.* (3), *Morgan* v. *Owners of S.S. Zenaida* (4), *Glasgow Coal Co.* v. *Welsh* (5), and *Fenton* v. *Thorley & Co.* (6)

[LORD COZENS-HARDY M.R. referred to *Eke* v. *Hart Dyke.* (7)]

Disease is an injury. If it can be related to some particular time or event it may be an accident: *Brintons, Ld.* v. *Turvey* (8); *Kelly* v. *Auchenlea Coal Co.* (9) In *Steel* v. *Cammell, Laird & Co.* (10) death from lead poisoning was held not to be the result of injury by

(1) (1909) 2 B. W. C. C. 8; 46 S. L. R. 325.
(2) (1916) 9 B. W. C. C. 371.
(3) 7 B. W. C. C. 428.
(4) 2 B. W. C. C. 19.
(5) [1916] 2 A. C. 1.
(6) [1903] A. C. 443.
(7) [1910] 2 K. B. 677.
(8) [1905] A. C. 230.
(9) (1911) 4 B. W. C. C. 417; 1911 S. C. 864.
(10) [1905] 2 K. B. 232.

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accident because it could not be related to any particular event. See also *Broderick* v. *London County Council* (1), which was a gas poisoning case. *Eke* v. *Hart Dyke* (2) cannot easily be distinguished from the anthrax case, *Brintons, Ld.* v. *Turvey*. (3) In *Glasgow Coal Co.* v. *Welsh* (4) it was held to be sufficient to refer the injury to a period of eight hours' exposure to extreme cold ; it is sufficient in this case to refer the collapse to a shorter period of exposure to extreme heat—the man was working for four hours on the day of his death. The length of the exposure is immaterial. The collapse itself constitutes the accident. See also *Clover, Clayton & Co.* v. *Hughes*. (5)

*Greaves Lord* in reply. The real cause of death here was exhaustion from continued exertion while exposed to extreme heat. The original application was based upon that, and that is what was proved at the hearing. *Coe* v. *Fife Coal Co.* (6) is exactly in point. See also *Martin* v. *Manchester Corporation*. (7)

*Cur. adv. vult.*

July 29. LORD COZENS-HARDY M.R. The facts in this case have been so fully stated in the judgment which Pickford L.J. is about to read that it does not seem necessary for me to repeat them. I agree with his conclusion that the appeal must be allowed.

I will only add that the " nature of the injury " seems to me to have been accurately stated in the original application as " heat-stroke and exhaustion on the 2nd, 3rd, 4th, 5th, and 6th of June, 1915, death taking place on the latter day." The amendment made at the trial, doubtless under legal advice, does not to my mind diminish the effect of this statement, which is fully borne out by the evidence. While I am prepared loyally to follow the case of *Ismay, Imrie & Co.* v. *Williamson* (8) in similar circumstances, I am not willing to extend it to a case where every element of " by accident " seems to be wanting.

(1) [1908] 2 K. B. 807.
(2) [1910] 2 K. B. 677.
(3) [1905] A. C. 230.
(4) [1916] 2 A. C. 1.
(5) [1910] A. C. 242.
(6) 2 B. W. C. C. 8 ; 46 S. L. R. 325.
(7) (1912) 5 B. W. C. C. 259.
(8) [1908] A. C. 437 ; 1 B. W. C. C. 232.

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PICKFORD L.J. The claim of the applicant in the case arises out of the death of her husband, William Pyper, a fireman on the steamship *Manchester Port*, belonging to the appellants. The evidence adduced before the county court judge included certain depositions and the report of an inquiry held at Perim after the death of Pyper, and objection was taken to the admission of these documents. The learned judge admitted them in evidence, but in his judgment said that his findings did not proceed upon them, but on the evidence in the official log, the certificate of death, and the evidence of a fireman who was called before him. It was not, therefore, necessary to decide the question of the admissibility of these documents, and, as we have not heard argument from the applicant on the point, I will not say more than that on what I have heard I am by no means satisfied that the documents were admissible. The facts were that in June, 1915, the steamship *Manchester Port* was in the Red Sea, and the heat was very great and became greater day by day. All the engineers and firemen suffered more or less from the heat, and all complained of it. Pyper and another man called Edwards seem to have suffered a good deal, and from time to time Pyper while engaged in trimming lay down on the coal utterly exhausted.

On the morning of June 5 he complained of being sick and was given a dose of stimulating mixture, and in the afternoon he complained again of the heat, but was persuaded to go on at his work and do what he could as it made it hard for the rest of the men, who were also suffering from the heat, if he did not. Edwards seems from the entries in the log to have suffered very much in the same way as Pyper, but not so severely. On the morning of June 6 Pyper went to work, and about 1 P.M. took another dose of stimulating medicine. He returned to his work about 2 P.M. and continued intermittently until 4 P.M., having complained in the interval of feeling ill, and having stopped work more than once to drink water or tea and to get air by going near to the ventilator. At 4 P.M. the second engineer was told of his condition, and went down to the store-room, where he then was, to see him. He told him to go on deck, but Pyper said he would wait a little and then go forward. At 4.30 the second engineer went to see him again to tell him to go on deck and found him collapsed. He was taken up on deck, but never recovered and died soon after. The proper entry of his death

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was made in the official log signed by the master and the first engineer, and the cause of death was stated as heat-stroke. The question is whether under those circumstances Pyper's death resulted from accident. There cannot be any doubt that it occurred in the course of and arose out of his employment, and if it resulted from accident the applicant is entitled to recover.

The learned judge has attached much importance to the certificate of the cause of death, saying that stroke in itself imports something sudden, and that according to medical science heat-stroke is regarded as traumatic and not idiopathic. I cannot help thinking that he attached too much importance to this matter. The certificate of the cause of death is signed by the master and the engineer, and no medical evidence was called at all. It was suggested that they signed it after consultation with a doctor who was present at an inquiry held after the death. This is only speculation, as there is no evidence to the effect; but in any case it seems to me that it is the circumstances of the death that have to be looked at, and not the name by which the cause of it is called, even by doctors. With regard to the description of traumatic and not idiopathic, no evidence was given on this subject, and there is no reference to any medical treatise. The words are to be found in one head-note to *Ismay, Imrie & Co.* v. *Williamson* (1), but they do not appear in the report in [1908] A. C. 437, and are not to be found in any of the judgments. The reporter may have got them from the evidence of some medical witness not reported or from some medical treatise, but they cannot, any more than the word "stroke," determine whether the death resulted from an accident. As the learned judge assumed without evidence that the word "heat-stroke" necessarily means something sudden, I have thought it relevant to see whether that is the case. According to medical treatises heat may produce death in various ways, the three most important being heat syncope, heat apoplexy or asphyxia, and thermic fever. There is no evidence in this case as to which of these three was present, but the last may probably be excluded, as Pyper's temperature when taken was found to be normal. There is, however, no history of his temperature on the day that he died. In the first the symptoms are often those of exhaustion usually

(1) 1 B. W. C. C. 232.

preceded by sickness, excitement followed by drowsiness and syncope. In the second the attack is usually sudden in the form of an apoplectic seizure. These facts are not taken from evidence in the case, but merely extracted from medical works for the purpose of showing that too much importance must not be attached to the word " heat-stroke," as it is used to denote all these three forms of death from heat, all differing in their symptoms, and the first, i.e., syncope, not being at all necessarily sudden. If it be admissible to consider them, the history of Pyper's case seems to point to death from syncope, and it may be noticed that the applicant's first particulars alleged the death to have occurred from exhaustion. These words, however, and the reference in the particulars to any of the days before June 6 were struck out on amendment during the trial. I do not, however, base my judgment on these grounds, but on the facts as proved. Pyper, in common with many members of the crew, suffered from a perfectly well known cause, i.e., heat in the stokehold of a steamer in the Red Sea. He began to suffer as soon as they entered the Red Sea, he suffered more as they got further on their voyage and the weather got hotter, and as he perhaps got weaker from the continuing effect of the previous day's heat, and he continued day by day to do his work knowing that he would be affected in the same way by the heat, but not the extent to which he would suffer. There was no proof that the conditions were in any way abnormal except a suggestion, if the inquiry may be looked at, that there ought to have been some native firemen on board. In the absence of authority I should be of opinion that death under these circumstances cannot be said to have resulted from an accident. The elements of accident, such as suddenness and unexpectedness or miscalculation, all seem to be absent; everything happened as might be expected, and Pyper's death resulted from the same cause acting in a manner greater in degree, but the same in kind as before, and not from any new or unexpected cause.

But it was strongly argued that we were bound by authority, chiefly that of the case already mentioned,—*Ismay, Imrie & Co.* v. *Williamson* (1)—to hold that this was death by accident. I had considerable doubt at times during the argument whether that case and the others mentioned—e.g., *Maskery* v. *Lancashire Shipping*

(1) [1908] A. C. 437; 1 B. W. C. C. 232.

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*Co.* (1), *Morgan* v. *Owners of S.S. Zenaida* (2), *Brintons, Ld.* v. *Turvey* (3), and *Sheerin* v. *Clayton & Co.* (4)—did not cover this, but on the whole I do not think they do so. In the first three there was an element of suddenness and unexpectedness which does not exist here. In *Brintons, Ld.* v. *Turvey* (3) the cause was the sudden and unexpected impact of an anthrax bacillus on the eye. The last is, I think, also distinguishable, and at any rate it is not binding on us. There was not in any of those cases a voluntary submission to a well-known and normal cause affecting the greater part of the crew, and known by the deceased man to be likely to affect him, though he did not know to what extent.

I think the appeal should be allowed. It is no doubt important for the respondents that the question of their liability should be determined, but I hope they will not overlook the fact that this man met his death by working in their interest in a way which the master has recorded in the log to be meritorious.

WARRINGTON L.J. The workman in this case was a fireman and coal trimmer on board his employers' ship. He died on June 6, 1915, when the ship was at sea near Perim. The cause of death is described in the certificate entered in the log as "heat-stroke." The county court judge has held that his death was the result of an "injury by accident" within the meaning of the Workmen's Compensation Act. The question is whether he was right in so holding.

This is not, in my judgment, a case in which we have only to determine whether there was evidence on which the judge could properly come to the conclusion at which he arrived. In my opinion the question whether the injury of which the man dies is an injury by accident within the meaning of the Act is a question of the construction and effect of the Act when applied to the facts of the particular case, and is therefore a question of law. This is brought out with great clearness in reference to the analogous question what is an accident arising out of an employment in the speech of Lord Atkinson in *Herbert* v. *Samuel Fox & Co.* (5); see also per Lord

(1) 7 B. W. C. C. 428.
(2) 2 B. W. C. C. 19.
(3) [1905] A. C. 230.
(4) [1910] 2 I. R. 105.
(5) [1916] 1 A. C. 405, 415.

Wrenbury in the same case. (1) We have therefore to determine whether on the facts the county court judge was right in holding that the man died as the result of injury by accident.

The facts are as follows: The workman was a fireman and trimmer employed on board the *Manchester Port*. So far as the evidence goes he was a man of ordinary physique. On and after June 2, while in the Red Sea, the ship encountered excessive heat, by which the men in the stokehold generally were much affected. The man in question complained much of the heat and gradually grew worse, and on the morning of June 5, as stated in the log, he complained of being sick on account of the heat, and the captain gave him some medicine. His temperature was then normal. At 1 P.M. on the same day he again complained, but was persuaded to keep on at his work and do what he could as it made it hard on the rest of the men, who were also suffering from the heat. His temperature was still normal. On the next day, June 6, he went on watch at 12 noon. He worked till about 1 o'clock, when he asked for some medicine, which was given him; he would seem to have worked again till 2 P.M., when he went forward. He was persuaded to return to the bunker, and was working there with some help until some time after 2.30. He then had to rest, lying on the coal in the bunker. From this time, as I understand the evidence, he did no work. He was not, however, brought into the open air, and at 4.30 he was found in a state of collapse and shortly afterwards died. In the certificate of death among the ship's papers he is said to have died of "heat-stroke." As to this the learned judge says: "He died, according to the certificate of death, from 'heat-stroke'—the word stroke in itself implies something sudden, and according to medical science heat-stroke is regarded as traumatic and not idiopathic." The passage I have read appears to contain the ground on which the judge arrived at his conclusion. As to the expression "heat-stroke," I think the learned judge attached too much importance to its use in the certificate. It seems to me that it was merely a conventional way adopted by the master of describing death from the effects of incessant heat. The reference to the supposed traumatic character of "heat-stroke" appears to be taken from the marginal note of the report in Butterworth of *Ismay*,

(1) [1916] 1 A. C. 419.

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*Imrie & Co.* v. *Williamson* (1), but neither that report nor the report of the same case in [1908] A. C. 437 affords any clue to the origin of the statement; it is certainly not to be found in the judgments. Whether it be scientifically true or not seems to me to be immaterial; there is no evidence one way or the other. In my opinion the grounds put forward by the judge in support of his conclusion are insufficient. But, for all this, it is said that the facts support it, and it is necessary to consider whether they do so.

That the injury referred to in the Act may be what is commonly regarded as disease distinguished from external or internal injury of a more palpable nature such as a wound or a rupture is conceded and is already established by the cases. The most recent example is *Glasgow Coal Co.* v. *Welsh.* (2) On the other hand it is well settled that diseases contracted as incident to the employment are not in general to be treated as injuries within the meaning of the Act. Unless a disease is one of the scheduled industrial diseases, it must, in order to entitle the workman to compensation, be not only an injury but an injury by accident. Whether this last condition exists is in many cases a most difficult question.

In the first place I think it is incumbent on the applicant to indicate with some precision the time at which the injury by accident was sustained: see *Eke* v. *Hart Dyke.* (3) The "accident" is regarded in the Act as something of which notice can be given which is to fulfil the condition of being given as soon as practicable after the happening thereof: see s. 2, sub-s. 1.

There is involved also in the idea of accident the further element of suddenness and unexpectedness. This is recognized in the judgment most strongly relied upon by the respondent, namely, that of Lord Loreburn in *Ismay, Imrie & Co.* v. *Williamson.* (4) He says: "What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work." It is also recognized in *Glasgow Coal Co.* v. *Welsh.* (2) In both those cases it was possible to assign a definite cause and effect and to say that the effect was in each case sudden and unexpected.

The injury in the present case does not, in my opinion, fulfil those conditions. The man's death was, in my judgment, the result of a

(1) 1 B. W. C. C. 232.
(2) [1916] 2 A. C. 1.
(3) [1910] 2 K. B. 677.
(4) [1908] A. C. 437, 439.

continued exposure on several days to excessive heat, and not of such exposure for a few hours on June 6. He began to complain several days before his death, and I understand that to mean not merely that he was grumbling at the heat, but that he was ill with it; he gradually grew worse. There is nothing to show that the heat was so much greater on the 6th than on previous days as to account for its more serious effect, and I think the only conclusion is that the man succumbed at last to a gradually increasing weight of illness induced by continual exposure to excessive heat. The event therefore lacks the element of suddenness. Moreover, to encounter such heat in the Red Sea in June as may endanger the health and even the lives of men in the stokehold of a ship cannot, in my judgment, be properly said to be unexpected.

On the whole I think the man's death cannot properly be said to be the result of injury by accident within the meaning of the Act, and accordingly the appeal should be allowed and an award made in the appellants' favour.

Solicitors for appellants: *Botterell & Roche, for Vaudrey, Oppenheim & Mellor, Manchester.*

Solicitor for respondent: *C. P. Shepherd, for Field & Cunningham, Manchester.*

G. A. S.

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*July* 18, 19, 24.

## JENNESON, TAYLOR & CO. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

[1916 J. 239.]

*Ship—Charterparty—Cesser Clause—Charterer's Liability to cease on Completion of Shipment—Shipowners' Lien—Captain to sign Bills of Lading in prescribed Form—No Lien as against Bill of Lading Holder—Liability of Charterer for Delay at Port of Discharge.*

A charterparty provided that the captain should sign bills of lading in a prescribed form without prejudice to the charterparty, that the discharge should be at a specified rate per day, that the captain should have a lien on the cargo for freight, demurrage, and any other lawful claim against the charterer, and that the charterer's liability should cease on completion of shipment provided the cargo was worth the freight and demurrage. The captain signed bills of lading in the prescribed form which did not provide for any rate of discharge and under which no lien was given to the shipowners for demurrage or other claims. The cargo was not discharged within the time provided for in the charterparty:—

*Held*, following *Clink* v. *Radford* [1891] 1 Q. B. 625 and *Hansen* v. *Harrold* [1894] 1 Q. B. 612, that the cesser clause did not exempt the charterer from liability for the delay at the port of discharge.

Action in the commercial list tried by Rowlatt J. without a jury.

The plaintiffs, the owners of the steamship *Palestrina*, claimed demurrage, or alternatively damages, for the detention of the ship at Avonmouth, the port of discharge. The defendant was the charterer of the *Palestrina* under a charterparty dated April 26, 1915, which provided that the *Palestrina* should load a full cargo of wheat at Karachi and deliver it at one of certain named ports, including Avonmouth, on being paid freight at the rate of 50*s.* a ton. "The captain to sign clean shippers' usual Eastern trade form bills of lading . . . . at any rate of freight required by the charterer without prejudice to this charterparty. . . . . On arrival at port of destination, the cargo to be discharged without delay, and according to the custom of the port for steamers, but not less than twenty-four hours to be allowed from time of reporting at the custom-house before unloading shall commence, . . . . The captain

to have a lien on the cargo for all freight, dead freight and demurrage, and for any other lawful claim against the freighter. . . . . Charterer's liability to cease on completion of shipment, provided cargo is worth the freight and demurrage." The charterparty contained a marginal clause providing that the discharge was to be effected at Avonmouth at the rate of 600 tons a day. "Reporting day not to count. Running day (holidays, etc., excepted) as per 1890 charter." The defendant presented for signature, and the master signed, bills of lading in the specified form, which did not provide for any rate of discharge at Avonmouth and did not incorporate the charterparty terms as to demurrage, and under which no lien was given for demurrage or other claims by the owners.

The *Palestrina* arrived off the port of Avonmouth on July 10, 1915. The plaintiffs' case was that she was docked and ready to discharge on July 13 and that the lay days commenced on July 14. The discharge was not completed until July 27, which, excluding a Sunday, made thirteen days, whereas, the cargo being 5056 tons, the discharge should have been completed, at 600 tons a day, in nine days. The plaintiffs claimed for four days' demurrage.

The defendant relied on the cesser clause as a defence to the action, and further called evidence to show that the delay in the discharge was due to the default of the plaintiffs in that the steamer's winches were not in a condition to work as fast as the receivers of the cargo were ready and willing to take delivery; and, further, that the plaintiffs had no labour on July 14 and failed to have their discharging gear fixed until noon, and that they were not entitled to treat July 14 as a lay day.

*Roche*, *K.C.*, and *R. A. Wright*, for the plaintiffs. The cesser of liability clause affords no defence to this action. The rule laid down in *Clink* v. *Radford* (1) and affirmed in *Hansen* v. *Harrold* (2) is that the charterer is only relieved from liability by the cesser clause for matters in respect of which the shipowner has a lien on the cargo. By reason of the form of the bill of lading in this case, the plaintiffs had no lien on the cargo for demurrage or for damages for detention at the port of discharge. Therefore the cesser clause does not operate to relieve the defendant from liability. [They also referred

(1) [1891] 1 Q. B. 625. (2) [1894] 1 Q. B. 612.

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to *Budgett* v. *Binnington* (1), *Krüger* v. *Moel Tryvan Ship Co.* (2), and *Elder, Dempster & Co.* v. *Dunn.* (3)]

*Leck, K.C.*, and *Raeburn*, for the defendant. The cesser clause in this charterparty is not one which, as in some of the cases, is only co-extensive with the shipowners' lien. It is an absolute clause by which the charterer's liability is to cease on completion of shipment at the port of loading, provided that the cargo is worth the freight and demurrage. After that there is no liability on the charterer for anything which may happen at the port of discharge: *French* v. *Gerber.* (4) The plaintiffs have by the charterparty agreed that the defendant shall take bills of lading in a prescribed form which did not preserve their lien as against the bill of lading holders and did not provide for any rate of discharge. The plaintiffs, therefore, have no cause for complaint against the defendant because the charterparty rate of discharge was not complied with. The fact that the charterparty prescribed the form of bill of lading distinguishes this case from *Krüger* v. *Moel Tryvan Ship Co.* (2) [*Ropner* v. *Stoate, Hosegood & Co.* (5) was also cited.]

In any event, as the ship's discharging gear was not rigged until noon on the first day claimed for, the ship cannot be treated as having been ready to discharge on that day: *The Katy.* (6)

*Roche, K.C.*, replied.

*Cur. adv. vult.*

July 24. ROWLATT J. In this case a claim is made by the plaintiffs in respect of four days' detention of their ship by the defendant, the charterer, at Avonmouth, which was the port of discharge. The defendant in the first place relies on the cesser clause in the charterparty as relieving him from liability. By the terms of the charterparty the cargo had to be discharged at Avonmouth at the rate of 600 tons per day, but the captain was to sign without prejudice to the charterparty, and he did in fact sign, bills of lading in a specified form which did not provide for any rate of discharge at Avonmouth. The result was that, although under the charterparty the charterer undertook that the discharge was to be at that

(1) [1891] 1 Q. B. 35.
(2) [1907] A. C. 272.
(3) (1909) 15 Com. Cas. 49.
(4) (1876) 1 C. P. D. 737; (1877) 2 C. P. D. 247.
(5) (1905) 10 Com. Cas. 73.
(6) [1895] P. 56.

rate, the bill of lading holder was under no corresponding obligation, and, therefore, if, as the defendant contends, the cesser clause applies, the plaintiffs have lost their right to have the cargo discharged at Avonmouth at the rate of 600 tons a day. Such a result as that is contrary to the intention which is presumably to be imputed to the parties in a case of his kind. I need only refer to one sentence in the judgment of Lord Esher M.R. in *Clink* v. *Radford* (1), which he repeated in *Hansen* v. *Harrold* (2): "It cannot be assumed that the shipowner without any mercantile reason would give up by the cesser clause rights which he stipulated for in another part of the contract." That one sentence states the whole principle which is applicable to questions arising in connection with a cesser clause. But it is said for the defendant that in this case the cesser clause is absolute in its terms. I do not think it is so. The charterer's liability is only to cease providing the cargo is worth the freight and demurrage. That points to a connection between the cesser of the charterer's liability and the obtaining of a lien by the shipowners. I wish to add that, even if there had not been these words at the end of the cesser clause, I still should have held as a matter of construction that the effect of the clause was limited by reason of the general principle to which I have already alluded. Then it is said that the provision as to bills of lading being signed in this particular form shows that it was intended to give up the right to discharge at 600 tons per day. In my judgment the effect of that stipulation is exactly the contrary, because it shows that the only way to give any effect at all to the term of the charterparty as to discharging 600 tons a day is to keep it alive against the charterer by some limitation of the cesser clause. In other words, it being perfectly plain to both parties that the shipowners were to have no rights against the cargo, or the bill of lading holder, as regards the charterparty rate of discharge, the case becomes a much clearer case than *Hansen* v. *Harrold*. (2) Therefore I think the cesser clause does not relieve the charterer from liability in the circumstances of this case.

The next point that was urged was that the delay was caused by the fault of the ship. This charterparty is one which is governed

(1) [1891] 1 Q. B. 627. (2) [1894] 1 Q. B. 612.

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by the rule laid down in *Budgett* v. *Binnington*. (1) That rule goes back to the times of Lord Ellenborough, when shipping affairs were conducted in a rather different and more primitive way than they are at present. As I understand it, the principle is that the charterer is regarded as saying to the shipowner "If you let your ship sail upon my adventure, I will undertake that she will be free at the port of discharge in so many days." Therefore the charterer takes the risk of the ship being in difficulties at the port of discharge. The ship, however, must do nothing to prevent the discharge. It is said in this case that the ship did prevent it by not having proper winches. I am satisfied on the evidence that the winches were amply capable of doing the work of discharging the cargo at the necessary speed.

Lastly, it is said that in any case the first day did not count because the stevedores' gear was not ready till towards the middle of the day. My brother Bray has decided in another case that the time does not count under a charterparty in this form and at this same port until the stevedores' gear is rigged, but I do not think that he intended to decide that the getting ready of the gear can never be part of the first day's work, if it is done with dispatch the first thing in the morning. In this case it was known that the consignees were not going to take any cargo on that day; consequently the stevedores' men did not begin their work very punctually, but in my judgment the consignees waived any greater dispatch. Therefore I think this case should be treated as being on the footing of the ship's stevedores having set to work to rig their gear on the very first day, and therefore that day should count as if the gear had been rigged with all due dispatch.

In the result I give judgment for the plaintiffs for four days' detention at the rate agreed upon, namely, 90*l*. a day, with costs.

*Judgment for plaintiffs.*

Solicitors for plaintiffs: *Botterell & Roche, for Botterell & Roche, Sunderland.*

Solicitors for defendant: *William A. Crump & Son.*

(1) [1891] 1 Q. B. 35.

F. O. R.

[IN THE COURT OF APPEAL.]

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*May* 16, 17, 18; *July* 28.

## HALSEY AND ANOTHER *v.* LOWENFELD.

## LEIGH, THIRD PARTY.

*Landlord and Tenant—Lease—Outbreak of War—Alien Enemy Lessee—Rent accrued after Outbreak of War—Right of Action—Sub-lease—Covenant of Indemnity—Third Party Notice—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Trading with the Enemy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 87), *s.* 1, *sub-s.* 2.

Where the lessee under a lease made before the outbreak of war becomes an alien enemy on the outbreak of war, his covenant in the lease to pay the rent is not thereby extinguished or suspended, and he may be sued for the rent that accrues due during the war.

If such a lessee has assigned the lease with a covenant of indemnity against his liability for the rent, his remedies are suspended whilst he is an alien enemy, so that he cannot during the war enforce his right to indemnity either by a third party notice or otherwise.

Decision of Ridley J. affirmed.

Appeal from the decision of Ridley J. without a jury. (1)

By a lease dated March 18, 1896, which defined the expressions "lessor" and "lessee" as including the assigns of the lessor and of the lessee respectively, one Edgar Bruce (since deceased), as lessor, demised to the defendant Lowenfeld, as lessee, the Prince of Wales' Theatre for the term of twenty-four years from Christmas, 1895, at the yearly rent of 6000*l.* payable by monthly instalments of 500*l.* in advance on the last Saturday in each month. The lease—it was in fact an underlease—contained a recital that the lessee had paid or allowed in account to the lessor the sum of 3250*l.* to be held by the lessor on the terms thereinafter contained; and with reference to this sum it was provided that during the first six of the last seven years of the said term the said rent of 6000*l.* should be reduced by 500*l.* per annum, and in the last year by 250*l.*, for the purpose of allowing the lessee to be repaid the said sum of 3250*l.*, such sums of 500*l.* and 250*l.* being deducted by the lessee being given credit for one twelfth of such sums respectively on each monthly payment of rent accruing due during such years. The

(1) [1916] 1 K. B. 143.

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lease contained a covenant by the lessee to pay the said rent thereby reserved in advance at the times and in manner thereinbefore appointed for payment thereof respectively clear of all deductions except landlord's property tax. It also contained a number of other covenants by the lessee usual in leases of similar premises in London; and it contained covenants by the lessor for quiet enjoyment, for performance of the covenants in the superior lease, and for the maintenance of the structural walls of the demised buildings in good and substantial repair.

By a deed dated March 21, 1899, the lessee assigned the premises comprised in the lease to one Lederer "together with the full benefit of the sum of 3250*l.* so deposited as aforesaid and the income thereform and the interest of the said H. Lowenfeld therein," and Lederer covenanted for himself and his assigns to indemnify the lessee against liability for the rent. Subsequently Lederer assigned the benefit of the lease with a like covenant of indemnity to one George Edwardes, who assigned the benefit of the lease with a like covenant to one Leigh, in whom the term was vested at the commencement of the action. Leigh had sub-let the theatre to one Curzon, who was in possession of it.

The lessee was an Austrian subject, and on the outbreak of war in August, 1914, he became an alien enemy. In July, 1915, the plaintiffs, as assignees of the lessor's interest under the lease, sued the lessee for 500*l.*, being the rent due for the month of June, 1915; and in September, 1915, they commenced a second action against him for 1000*l.*, being the rent due for the months of July and August. The two actions were consolidated. The lessee contended that he could not be sued on his obligations under the lease during the war; but if he was held liable he claimed to be indemnified against the rent by Leigh and Curzon, on whom he served third party notices under Order XVI., r. 48, and he also claimed to be allowed certain deductions from the rent under the above stated provisions in the lease. Ridley J. overruled the contentions of the lessee and disallowed his claim for deductions, and gave judgment for the plaintiffs for 1500*l.* The lessee appealed.

*Heber Hart, K.C.*, and *Blanco White*, for the appellant. This lease cannot be performed without commercial intercourse between the

parties, and therefore it is either suspended during the war or entirely avoided. The principle is stated in Halsbury's Laws of England, vol. 1, p. 311, vol. 7, p. 463; *The Hoop* (1); *Janson* v. *Driefontein Consolidated Mines* (2) The effect of a declaration of war is to prohibit all intercourse with an alien enemy except by licence from the Crown: *The Panariellos* (3); *Robson* v. *Premier Oil and Pipe Line Co.* (4); *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (5) But where the cause of action accrues before the war and nothing remains to be done except to enforce payment a British subject may sue an alien enemy: *Robinson* v. *Continental Insurance Co. of Mannheim* (6); *Leader* v. *Direction der Disconto Gesellschaft.* (7) Here the lessee's covenants in the lease are executory and must give rise to some intercourse between the parties, but there can be no contractual relations between enemies during war: *Distington Hematite Iron Co.* v. *Possehl & Co.* (8); *Porter* v. *Freudenberg* (9); *Wolf & Sons* v. *Carr, Parker & Co.* (10); *Kreglinger & Co.* v. *Cohen.* (11)

[LORD READING C.J. referred to the Proclamation of September 9, 1914, and the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1.]

There is no case in which an action has been maintained against an alien enemy on a cause of action that has accrued after the outbreak of war except *Porter* v. *Freudenberg* (9), and in that case the point now raised was not taken. The decision in *London and Northern Estates Co.* v. *Schlesinger* (12) turned on the construction of an order and is not in point. In the next place, if the defendant is liable to the plaintiffs he is entitled to defend himself and to use all the means and appliances of defence: *Porter* v. *Freudenberg* (13); *McVeigh* v. *United States* (14); Judicature Act 1873, s. 24, sub-s. 3. He is not setting up a counter-claim or seeking to assert an independent claim, as in *Wynne* v. *Tempest.* (15) His claim to indemnity

(1) (1799) 1 C. Rob. 196.
(2) [1902] A. C. 484.
(3) (1915) 84 L. J. (P.) 140.
(4) [1915] 2 Ch. 124, 135.
(5) [1915] 2 K. B. 379, 390.
(6) [1915] 1 K. B. 155.
(7) [1915] 3 K. B. 154.
(8) [1916] 1 K. B. 811.
(9) [1915] 1 K. B. 857, 867.
(10) [1915] W. N. 195; 31 Times L. R. 407.
(11) (1915) 31 Times L. R. 592.
(12) [1916] 1 K. B. 20.
(13) [1915] 1 K. B. 857, 882–3.
(14) (1870) 11 Wall. 259.
(15) [1897] 1 Ch. 110, 114.

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is dependent on his liability to the plaintiffs. If he is held liable, he seeks by the third party notice to shift his liability on to the shoulders of the party who is really liable to pay the rent: *Moule* v. *Garrett*. (1) Lastly, on the terms of the lease the defendant is entitled to certain deductions from the amount claimed by the plaintiffs.

*Rose-Innes, K.C.*, and *Lilley*, for the respondents. The principle underlying the prohibition of intercourse between the subjects of this country and an alien enemy is to cripple the enemy and benefit this country—*Esposito* v. *Bowden* (2)—and does not, it is submitted, extend to intercourse which is to the advantage of this country: *Kershaw* v. *Kelsey* (3); *Robson* v. *Premier Oil and Pipe Line Co.* (4) *Porter* v. *Freudenberg* (5) contains a review of the whole law on the subject. In that case the rent had accrued after the outbreak of war, and it is true that the point now taken by the appellant was not raised, but the judgment is based, it is submitted, on the assumption that an alien enemy may be sued in the King's Courts during the war. (6) No case has decided that an executory contract is dissolved as to both parties on the outbreak of war. The true view is that the remedy may be suspended during the war: *Janson* v. *Driefontein Consolidated Mines*. (7) Further, it is contended that so long as an alien enemy holds property in this country he cannot retain it without performing the obligations connected with it. Suppose Lowenfeld had not assigned the lease, then on the outbreak of war, if as he contends the contract was dissolved, the result would be remarkable. The estate would remain vested in him, an alien, freed from the obligations of his covenants in the lease. It is submitted that his obligations are not dissolved but continue, and that he may be sued for the breach of them. As to his claim for deductions from the rent, he is not entitled to any allowance because he assigned the premises with the benefit of the lease to Lederer.

*Graham Mould*, for Leigh, third party. The appellant's remedy against me is suspended during the war. The question depends

(1) (1872) L. R. 7 Ex. 101.
(2) (1857) 7 E. & B. 763, 778–9.
(3) (1868) 100 Mass. 561.
(4) [1915] 2 Ch. 124, 136.
(5) [1915] 1 K. B. 857.
(6) Ibid. 880.
(7) [1902] A. C. 484, 493.

on the construction of the Judicature Act, 1873, s. 24, sub-s. 3. Before the Act the appellant could not have brought me in as a party to the action. He must have brought a separate action for indemnity against me. A third party notice is analogous to a writ : *McCheane* v. *Gyles*. (1) The section has only altered the procedure and not the rights of parties. I am entitled to the same rights as if I were a defendant in a separate action.

[He was stopped.]

Curzon was not represented.

*Heber Hart, K.C.*, in reply on the main question referred to *Potts* v. *Bell* (2) ; *Rex* v. *Oppenheimer* (3) ; *Rex* v. *Kupfer* (4) ; and on the third party notice to *Porter* v. *Freudenberg*. (5)

*Cur. adv. vult.*

July 28. LORD READING C.J. The plaintiffs sued the defendant to recover 1500*l.* for rent due to them at the rate of 500*l.* per month in respect of the Prince of Wales' Theatre for the months of June, July, and August, 1915. Save as to part of the amount claimed it is not disputed that the plaintiffs are entitled to the rent, but it is contended that as the defendant is an alien enemy, that is, an Austrian subject residing in Austria, he is not liable to pay the rent on the ground that, owing to the state of war, the contract hitherto subsisting between him and the plaintiffs is dissolved or suspended. If found liable to the plaintiffs, the defendant by a third party notice claimed indemnity against John Leigh. Ridley J. gave judgment for the plaintiffs and held that the defendant could not maintain the third party claim. The defendant appeals from this decision and asks that judgment should be entered for him on the plaintiffs' claim, and if held liable he appeals against Ridley J.'s judgment on the third party claim. [His Lordship stated the facts and continued :] The question raised in the case is whether the plaintiffs during the war can sue an alien enemy under a lease granted before the war. It is contended on behalf of the defendant that upon the outbreak of war all intercourse, commercial or otherwise, between persons resident here and alien enemies became

(1) [1902] 1 Ch. 287, 298.
(2) (1800) 8 T. R. 548, 554.
(3) [1915] 2 K. B. 755.
(4) [1915] 2 K. B. 321.
(5) [1915] 1 K. B. 857, 881.

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illegal, and consequently that a lease granted before the war to one who since the war became an alien enemy was either suspended during the war or determined, and that no action could be brought during the war to recover payment under the covenant in the lease from an alien enemy. That commercial intercourse between inhabitants of this country with alien enemies, unless permitted by the Sovereign, is prohibited and illegal is beyond question: see *The Hoop* (1); *Esposito* v. *Bowden* (2); *Porter* v. *Freudenberg.* (3) And this prohibition at common law of intercourse between residents in this country and aliens is not confined to commercial or trading intercourse: see *The Panariellos* (4); *Robson* v. *Premier Oil and Pipe Line Co.* (5) The prohibition is based on public policy, which forbids the doing of acts that will or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities and by adding to the resources available to individuals in the enemy State: see *Porter* v. *Freudenberg.* (6) In the present case the contract whereby the defendant covenanted, inter alia, to pay rent in respect of the property known as the Prince of Wales' Theatre was a subsisting and valid and enforceable contract at the outbreak of war. Since the war no intercourse has in fact taken place with the alien enemy, unless it can be said that seeking to obtain payment by him of the rent due under the lease is within the prohibition of common law and consequently illegal. It is contended for the defendant that not only would the payment be illegal, but that the lease itself must be treated as at an end or suspended in consequence of the war. Payment by or on account of an alien enemy to persons resident in this country is not trading with the enemy and is permitted, if the payment arises out of a transaction entered into before the outbreak of war. This is provided in s. 7 of the Proclamation relating to trading with the enemy dated September 9, 1914, which has legislative authority, for by the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-s. 2, it is declared that "any act permitted by or under any such Proclamation shall not be deemed to be trading with the enemy." In order to avoid misconception, the payment is permitted only when not made or

(1) 1 C. Rob. 196.
(2) 7 E. & B. 779.
(3) [1915] 1 K. B. 857, 867.
(4) 84 L. J. (P.) 140.
(5) [1915] 2 Ch. 124.
(6) [1915] 1 K. B. 857, 868.

accompanied by terms, conditions, or circumstances which would in themselves constitute a trading with the enemy. Upon this ground I hold that the plaintiffs would not commit an illegal act if they claimed and received payment from the defendant of rent due under a lease granted to him before the war, and that they are entitled to succeed in this action.

I have had the opportunity of reading Warrington L.J.'s judgment, and I agree with his conclusion as to the continued validity of the lease at the outbreak of war, and with his reasons for this conclusion. I desire to add that the contention that a lessee who has become an alien enemy is released from all obligations undertaken before the war cannot be sustained. There is no authority for such a proposition in any of the cases or text-books, and in my judgment it is unsound in principle. The prohibition of intercourse between persons in this country and alien enemies is based on public policy, and it would indeed be a strange result if a law so founded was held to apply to relieve an alien enemy of obligations incurred before the war in respect of property of which he is not deprived by the Crown; for the property of alien enemies is at common law subject to confiscation by the Crown in virtue of the Royal prerogative: see Hale's Pleas of the Crown, vol. 1, p. 95; *Porter* v. *Freudenberg*. (1) But if the Crown refrains from exercising the right to confiscate and allows the alien enemy to continue in ownership of the property, he holds it subject to all its obligations. It would be manifestly absurd that he should derive the advantage of holding the property without liability to perform the obligations incident to his right of ownership. For example, if a freehold is held by him subject to a restrictive covenant not to build within a period of years, can it be said that the consequences of war are that the alien enemy is allowed to remain the owner of the estate but is freed from the obligations of the covenant? If the contract is dissolved as contended, the estate would be freed for ever from the burden of the covenant. In my judgment the covenant remains notwithstanding the war. If there is a breach of covenant, the enemy may be sued, although no doubt there are difficulties in serving him. In the present case those difficulties have been surmounted and the alien enemy has appeared. In my opinion Ridley J.'s judgment in

(1) [1915] 1 K. B. 857, 867.

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favour of the plaintiffs upon the point of liability of the defendant is correct. It was argued that if the alien enemy's rights under the covenants are not dissolved by the war, at least they are suspended, and that therefore the plaintiffs' rights under the covenants are also suspended. But it is the remedy of the alien enemy which is suspended, not because the covenant has ceased to operate during the war, but because the alien enemy cannot have recourse to the King's Courts to enforce a right until he has ceased to be an alien enemy.

This brings me to the next point, namely, whether the defendant can enforce his claim to indemnity by a third party notice. The objection taken is that he cannot become "actor" in proceedings in the King's Courts, and that he must be regarded as a plaintiff in an action seeking a remedy against the third party who must be regarded as a defendant. Ridley J. has upheld this objection, and I come to the same conclusion. This point turns entirely upon the interpretation of the language of the Judicature Act, 1873, s. 24, sub-s. 3, in reference to third party notice: "and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant." The right of the defendant to bring a third party into an action to which he was not a party was given in order to enable the defendant to pursue his remedy for indemnity in the action in which it was sought to make him liable to the plaintiff, but although the third party thus becomes a party to the cause, his rights in respect of his defence against a claim for indemnity are preserved to him and are to be treated as if in an action brought against him. If the alien enemy had brought a separate action against the third party, one of the answers would have been, as it is now, that the alien enemy could not sue during the war. We must decide according to the words of the statute, which are plain, and therefore we must regard the third party claim for this purpose as a separate action by the defendant, with the inevitable result that the defendant's third party claim fails.

I agree with Warrington L.J. that the claim must be reduced by the amount of 125*l.*, and that to that extent the judgment must

be varied. Subject to this variation the appeal must be dismissed with costs.

Lush J. has read this judgment and desires me to say that he agrees with it.

WARRINGTON L.J. The plaintiffs are the persons now entitled to the reversion expectant on the determination of a lease dated March 18, 1896, of the Prince of Wales' Theatre, and to the benefit of the covenants by the lessee therein contained. The defendant is the original lessee under the lease. The term has become vested by assignment in one Leigh. The action is for the recovery, under the covenant by the lessee for the payment of rent, of three monthly payments falling due respectively in June, July, and August, 1915. The defendant is an Austrian subject resident in Austria, and is therefore an alien enemy. He contends that the outbreak of war between this country and Austria rendered illegal the further performance of the contract between him and the plaintiffs, and that both parties were discharged from their obligations to each other thereunder, with the result that, inasmuch as the rent for which he is sued accrued due after the outbreak of war between this country and Austria, he was under no liability to pay it, and this action must therefore fail. Ridley J. has overruled this defence and has given judgment for the plaintiffs for 1500*l.*, the full amount claimed. The defendant issued a third party notice against Leigh, as assignee of the lease, claiming indemnity. Leigh insisted that the defendant, being an alien enemy, cannot during the war maintain an action in the Courts of this country, that the third party is an actor, and that he was accordingly entitled to judgment. The defendant, on the other hand, contends that by issuing the third party notice he was merely exercising a right conferred upon him as a defendant and ought not to be treated in respect thereof as an "actor," and he relies upon the principles expressed in *Porter* v. *Freudenberg* (1) as to the rights of an enemy when sued in this country. Ridley J. has overruled the defendant's contentions and has given judgment for Leigh on the third party notice. The defendant appeals from the judgment against him in the action, and if that appeal fails, then from the judgment on the third party notice. A minor question

(1) [1915] 1 K. B. 857, 867.

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arises whether the defendant is entitled to a deduction from the full amount claimed by virtue of certain provisions in the lease to which I will refer later. The material facts are as follows: [His Lordship stated the facts and continued:]

The first question, then, is whether under the circumstances of this case the outbreak of war discharged the defendant, an alien enemy, from his liability, otherwise indisputable, to pay the rent under the lease of 1896. The following general propositions are, I think, clearly established: (1.) By the common law of England on the outbreak of war between Great Britain and another nation it becomes unlawful for a British subject to engage in any intercourse with an enemy, whether of a commercial nature or otherwise, unless it be with the permission, express or implied, of the executive authority. (2.) It follows that any intercourse on the part of a subject of Great Britain with an enemy incidental to the performance by either party of contractual obligations is unlawful. These propositions are, I think, covered by authority: see *The Panariellos* (1) and the cases there cited, and *Robson* v. *Premier Oil and Pipe Line Co.* (2) It follows that, if a contract at the outbreak of war remains to be performed by both parties, it would be unlawful for that one of them who is a British subject to perform his part. The contract would be an illegal contract and both parties would be discharged. I think, moreover, that though the substantive obligation to be performed is that of the enemy only, yet if its performance necessitates the concurrence of the other party, the promisee, and that involves unlawful intercourse with the alien, the latter would be discharged from his obligation. This is really only an example of the general rule, for the concurrence of the promisee would be afforded in pursuance of a duty arising from the contractual relation. The next question is whether the present case comes within the rule. It must first be determined what relative obligations of the plaintiffs and the defendant remained to be performed at the outbreak of war. As regards the covenants by the lessor, I think it must be taken that they would all run with the land, and that the benefit of them would pass to the assignee. It is true that amongst them was a covenant by the lessor to perform the lessee's covenants contained in the superior lease, and it is of

(1) 84 L. J. (P.) 140. (2) [1915] 2 Ch. 124.

course possible that that lease may have contained a covenant of an exceptional character which would not run with the land. The superior lease has not been put in evidence, but I think we are entitled to assume as against the defendant, on whom the onus rests of establishing his defence, that it did not contain such an exceptional covenant. If I am right so far, the only substantive obligations as between the parties to the present action remaining to be performed were those to be performed by the defendant. Of these the only one with which we are concerned is the covenant for payment of the rent. The next question is, did the performance of this obligation by the defendant require the concurrence of the plaintiffs, and, if so, would such concurrence be unlawful? It did require the plaintiffs' concurrence, inasmuch as payment by one party involved receipt by the other. It does not follow, however, that such receipt was unlawful, and I think the Proclamation of September 19, 1914, establishes that it was not, but was an act permitted by the executive authority. The Proclamation, after warning people against doing certain acts and entering into certain transactions as involving trading with the enemy, contains the following provision: "Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted." In terms the clause purports to allow payments by or on account of the enemy and says nothing about receipts; but I think it must be construed to authorize—if such authority be necessary—the receipt by a British subject of a payment so made. If this is so, the performance by the defendant of his obligation did not involve any unlawful act on the plaintiffs' part, and I see no reason why the defendant should be treated as released. Subject to the question as to the deduction claimed by the defendant, which I will deal with later, I think the appeal from the judgment against the defendant fails and must be dismissed.

Now as to the third party notice. The question is whether the third party is entitled to be placed in the same position as he would be in if he were defendant to an action by the present defendant as plaintiff. In that case he would be entitled to judgment inasmuch

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as the remedy of the plaintiff, as an alien enemy, would be suspended during the war: *Porter* v. *Freudenberg*. (1) The right to issue the third party notice is derived from the Judicature Act, 1873, and the rules thereunder. Sub-s. 3 of s. 24 is as follows: "The said Courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also, all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant." In my opinion this deals with procedure only, and does not affect the rights of either the original defendant or the third party. If the third party had been sued in the ordinary way he would have been entitled to claim judgment on the ground that the suit could not be maintained. This is, in my opinion, a right in respect of his defence against the claim made by the third party notice, and he is therefore under the express words of the statute entitled to insist on such right. In this respect also the judgment is, in my opinion, correct and should be affirmed.

There remains the question as to the deduction from the rent claimed by the defendant. [His Lordship then considered the provisions of the lease and the assignment on this point, and held that the defendant was entitled to the reduction of 1500*l.* by a sum of 125*l.*, and that judgment ought to be entered for 1375*l.* instead

(1) [1915] 1 K. B. 857.

of 1500*l.*, and continued :] I desire to add that I concur in the general observations of the Lord Chief Justice as to the position of alien enemies holding property in this country.

Solicitors for appellant : *Hutchinson & Cuff.*

Solicitors for respondents : *Valpy, Peckham & Chaplin ; C. F. J. Jennings.*

H. L. F.

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[IN THE COURT OF APPEAL.]

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## FINEGOLD *v.* CORNELIUS.
## PHILLIPS, THIRD PARTY.

[1915 F. 1055.]

*Money-lender—Business carried on elsewhere than at Registered Address—Isolated Transaction—Avoidance of Transaction—Promissory Note—Bona fide Holder for Value—Indemnity against Money-lender—Money-lenders Acts,* 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2, *and* 1911 (1 *&* 2 *Geo.* 5, *c.* 38), *s.* 1, *sub-s.* 1.

By s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, a money-lender shall carry on the money-lending business at his registered address or addresses, and at no other address ; and sub-s. 2 imposes a penalty upon a money-lender who carries on business elsewhere than at his registered address.

By s. 1, sub-s. 1, of the Money-lenders Act, 1911, notwithstanding anything in s. 2 of the Money-lenders Act, 1900, any agreement with or security taken by a money-lender shall be valid in favour of any bona fide assignee or holder for value without notice of any defect due to the operation of that section ; but the money-lender shall be liable to indemnify the borrower or any other person "who is prejudiced by virtue of this enactment."

The defendant at the request of A., who was in need of money, entered into a money-lending transaction with a person who was, though the defendant did not know it, a registered money-lender, the defendant signing a promissory note for 300*l.* payable to the money-lender or order six months after date, and the money-lender giving the defendant a cheque for 200*l.* The defendant indorsed the cheque and handed it to A., who received the amount thereof. The transaction was carried out in its entirety at a place other than the registered address of the money-lender. No evidence was given of any similar transaction carried out in its entirety elsewhere than at the registered address of the money-lender. The money-lender

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indorsed the promissory note to a bona fide holder for value without notice, and the latter sued the defendant upon the note. The defendant paid it, and claimed indemnity from the money-lender under s. 1, sub-s. 1, of the Money-lenders Act, 1911, as having been "prejudiced by virtue of this enactment," upon the ground that the transaction was void under s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, as the money-lender in entering into it was carrying on the money-lending business elsewhere than at his registered address, and that but for the Act of 1911 the defendant would have had a defence to the plaintiff's claim :—

*Held*, (1.), by Swinfen Eady and Phillimore L.JJ. (Bankes L.J. assuming it), that, though the transaction was an isolated one, in entering into it the money-lender was carrying on the money-lending business elsewhere than at his registered address in breach of s. 2, sub-s. 1 (*b*), of the Act of 1900 ; but (2.), by Swinfen Eady and Bankes L.JJ., Phillimore L.J. dissenting, that the transaction was not thereby rendered void, and that therefore the defendant was not entitled to an indemnity.

*Kirkwood* v. *Gadd* [1910] A. C. 422 and *Whiteman* v. *Sadler* [1910] A. C. 514 considered.

APPEAL from the judgment of Ridley J. at the trial of the action without a jury.

The action was brought against the defendant as the maker of a promissory note for 300*l.*, and the defendant claimed to be indemnified by the third party under the following circumstances :—

On the morning of November 24, 1914, one Harvey Shelmerdine, who was a friend of the defendant and who owed him a sum of about 3000*l.*, called upon the defendant at the latter's house at Formby, Lancashire, and asked him to back a bill so that he (Shelmerdine) could obtain some money, as he was hard up. The defendant consented, and they left the house together. Shelmerdine said that his friend who would lend the money was at the Blundell Arms Hotel, Formby, and they went to the hotel, where Phillips, the third party, was. Phillips was a registered money-lender, his registered name being Isadore Phillips and his registered address 33, Crown Street, Liverpool. The defendant had never seen Phillips before and did not know that he was a money-lender. Two promissory notes were produced, one for 300*l.* payable to Isadore Phillips or order six months after date, which the defendant signed and handed to Phillips. Phillips' registered address did not appear on the note. The other note was for the same amount payable to the defendant, and Shelmerdine signed it and handed it

to the defendant. Phillips drew a cheque for 200*l.* in favour of the defendant, signing it "I. Phillips," and the defendant then and there indorsed it and handed it to Shelmerdine, who received the amount. Before the promissory note signed by the defendant became due Phillips indorsed it for value to the plaintiff, who became the holder thereof without notice of any defect therein, and the plaintiff brought this action against the defendant to recover the 300*l.* due on the note. The defendant claimed to be indemnified by Phillips under s. 1, sub-s. 1, of the Money-lenders Act, 1911 (1), against liability

(1) The Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2:

"(1.) A money-lender as defined by this Act—

"(*a*) shall register himself as a money-lender . . . . under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

"(*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

"(*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; and

"(*d*) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

"(2.) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction" to a fine.

The Money-lenders Act, 1911 (1 & 2 Geo. 5, c. 38), s. 1:

"(1.) Notwithstanding anything in section 2 of the Money-lenders Act, 1900—

"(*a*) any agreement with, or security taken by, a money-lender shall be, and shall be deemed always to have been, valid in favour of any bona fide assignee or holder for value without notice of any defect due to the operation of that section, and of any person deriving title under him.

"(*b*) . . . .

but in either such case the money-lender shall be liable to indemnify the borrower or any other person who is prejudiced by

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on the note, and served a third party notice on Phillips accordingly. The plaintiff obtained leave under Order XIV. to sign final judgment against the defendant for 310*l.* 0*s.* 9*d.*, being the amount of the note with interest and costs, and the defendant paid this amount, and claimed to recover it from Phillips in the third party proceedings upon the ground that he (the defendant) was a person who was "prejudiced by virtue of" s. 1 of the Act of 1911, as but for that enactment he would have had as good a defence against the plaintiff as he had against Phillips, namely, that Phillips in entering into the transaction was carrying on the money-lending business at an address elsewhere than at his registered address, and that therefore the transaction was void. It was not alleged that any other money-lending transaction had been entirely carried out by Phillips elsewhere than at his registered address.

The third party proceedings went to trial before Ridley J. without a jury at Liverpool, when the learned judge came to the conclusion that the defendant was the borrower from the money-lender, and that the whole transaction was carried through from beginning to end at the Blundell Arms Hotel; and he held that the contention of the defendant was correct, and gave judgment for the defendant against the third party for 310*l.* 0*s.* 9*d.*

The third party appealed.

*Rigby Swift, K.C.*, and *Greaves Lord*, for the third party. Sect. 1 of the Money-lenders Act, 1911, was passed in consequence of the decision in *In re Robinson* (1) that a purchaser or assignee for value without notice of charges or securities which are void under s. 2 of the Money-lenders Act, 1900, is in no better position than the original holder. Sect. 1 of the Act of 1911 makes the security valid in the hands of a bona fide assignee or holder for value without notice, but provides that the money-lender shall be liable to indemnify the borrower or any other person who is prejudiced by virtue of the enactment.

In the first place, the money-lender here did not "carry on the

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virtue of this enactment, and nothing in this enactment shall render valid an agreement or security in favour of an assignee or holder for value who is himself a money-lender."

(1) [1911] 1 Ch. 230.

money-lending business " elsewhere than at his registered address within the meaning of s. 2, sub-s. 1, of the Act of 1900. It is said that he did so because this particular transaction was carried out at the Blundell Arms. But the facts show that the real borrower was Shelmerdine, and what took place at the Blundell Arms was merely the completion of a transaction of loan to Shelmerdine which was arranged at the money-lender's registered address. It was only one step in the transaction, and the Act does not require every step to be taken at the registered office : *Kirkwood* v. *Gadd.* (1) Even if the transaction is to be regarded as a loan to the defendant, and therefore as one solely between the defendant and the money-lender and carried through in its entirety at the Blundell Arms, it does not amount to a carrying on of the money-lending business at the Blundell Arms. It was an isolated transaction. The words " carry on the money-lending business " imply a habit. It could not be said that a shopkeeper carried on his business at a customer's house if one isolated transaction was carried out at the house. It would be a straining of language to say that a money-lender who has a registered address carries on business at a borrower's house if for the convenience of all parties the transaction is carried out at the borrower's house. As was pointed out in *Kirkwood* v. *Gadd* (1), the question is one of fact. It is difficult to see how a jury could find from one isolated transaction that the money-lender carried on his business at the place where that transaction took place. No doubt this Court in the same case (2) held that an isolated transaction came within s. 2, sub-s. 1 (*b*), of the Act of 1900, and was therefore void ; but the House of Lords (1) reversed the decision of the Court of Appeal upon the ground that a material part of the transaction was carried out at the registered address. Lord Atkinson (3) thought that an isolated transaction carried out from its inception to its completion at a place other than the registered address might be a carrying on of business elsewhere than at the registered address if the money-lender held himself out as ready to do business there or canvassed for business to be transacted there ; and Lord Loreburn (4) intimated a similar view. There was no evidence of

(1) [1910] A. C. 422. *Gadd* v. *Provincial Union Bank.*
(2) [1909] 2 K. B. 353 ; sub nom. (3) [1910] A. C. 433.
(4) Ibid. 424.

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anything of that kind here. The observations of Lord Mersey (1) strongly support the proposition that there must be something more than the mere carrying out of one complete transaction away from the registered address. There is a great difference between carrying out a transaction and carrying on business. [*Blair* v. *Buckworth* (2) was also referred to.]

Next, if the money-lender by carrying out this one transaction at the Blundell Arms contravened the provisions of s. 2, sub-s. 1 (*b*) of the Act of 1900, the transaction is not rendered void by that enactment, and the defendant is therefore not "prejudiced" by s. 1 of the Money-lenders Act, 1911, and cannot claim indemnity from the third party. Sect. 2, sub-s. 1 (*c*), of the Act of 1900, which prohibits a money-lender from entering into any agreement in the course of his business with respect to a loan or taking any security otherwise than in his registered name, strikes directly at the particular contract. But sub-s. 1 (*b*) does not make the contract void if there is a breach of that clause; the offender is only liable to a penalty under sub-s. 2. This is the effect of the opinions of Lord Dunedin and of Lord Mersey in *Whiteman* v. *Sadler*. (3) Lord Macnaghten did not differ in any way, and Lord Loreburn L.C. and Lord Ashbourne agreed with the opinions of Lord Macnaghten and Lord Dunedin.

[BANKES L.J. referred to *Peizer* v. *Lefkowitz*. (4)]

*Greer, K.C.*, and *C. Davies*, for the defendant. Phillips in entering into and carrying through this transaction of loan to the defendant at the Blundell Arms, though it was an isolated transaction, was carrying on business elsewhere than at his registered address, which is forbidden by s. 2, sub-s. 1 (*b*) and sub-s. 2, of the Money-lenders Act, 1900. Sect. 2, sub-s. 1 (*b*), requires the money-lender to carry on "the money-lending business" at his registered address and at no other address, and sub-s. 2 imposes a penalty if he carries on business elsewhere than at his registered address. So far as this particular transaction is concerned "the money-lending business" was carried on at the Blundell Arms. The carrying through of any one transaction from beginning to end is carrying on the business.

(1) [1910] A. C. 438.
(2) (1908) 24 Times L. R. 474.
(3) [1910] A. C. 514, 527, 534—536.
(4) [1912] 2 K. B. 235.

It does not concern the borrower to know that all other transactions are carried out at the registered address. In order to give protection to the borrower the enactment must mean that the money-lender shall not carry on any money-lending business elsewhere than at his registered address. In all the cases where the transaction has been held to be valid some part of it was carried out at the registered address. In *Kirkwood* v. *Gadd* (1) the transaction was initiated at the registered address of the money-lender, and the borrower knew with whom he was dealing. The observations of Lord Mersey (2) must be read in the light of those facts. The decision of the Court of Appeal in that case (3) went upon the assumption that the transaction was entirely carried out away from the registered address, and it was upon that point that the House of Lords reversed the decision, holding that, as part of the transaction took place at the registered address, the enactment had not been contravened. The House of Lords did not throw any doubt on the decision of the Court of Appeal that an isolated transaction completely carried out away from the registered address comes within s. 2, sub-s. 1 (*b*), of the Act of 1900. Lord Loreburn (4) and Lord Atkinson (5) state that an isolated transaction carried through from its inception to its completion at a place other than the registered address may amount to carrying on business elsewhere than at the registered address. If the observations of Lord Atkinson (5) and Lord Mersey (2) mean that there must be a habit of carrying on business at a place other than the registered address, they are not part of the decision of the House of Lords. This is pre-eminently a transaction within the mischief aimed at by the Act. The defendant was asked by a friend to back a bill for him, and they went together to an hotel where the money-lender was and the transaction was completely carried through there, the defendant not knowing that he was placing himself in the hands of a money-lender.

That being so, the transaction is forbidden by s. 2, sub-s. 1 (*b*) and sub-s. 2, of the Act of 1900, and is thereby made void. Those provisions amount to a specific command to the money-lender not to carry on the money-lending business elsewhere than at his

(1) [1910] A. C. 422.
(2) Ibid. 438.
(3) [1909] 2 K. B. 353.
(4) [1910] A. C. 424.
(5) Ibid. 433.

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registered address. The imposition of a penalty is sufficient to forbid the act which is penalized. In *Whiteman* v. *Sadler* (1) the House of Lords held that, where a money-lender was registered, though improperly, under two different names, the contracts entered into by him in one of his registered names were not made void by sub-s. 1 (*c*). That does not affect the question whether a contravention of sub-s. 1 (*b*) does not render the transaction void. Lord Macnaghten (2), Lord Dunedin (3), and Lord Mersey (4) expressly approve of the principle stated by Farwell L.J. in the Court of Appeal in that case (5), "that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party thereto who seeks to enforce it." Farwell L.J. further said in that case that he saw no practical difference between carrying on the money-lending business in more than one name in violation of s. 2, sub-s. 1 (*a*), or at an address other than his registered address under clause (*b*), and entering into agreements under clause (*c*). The House of Lords did not dissent from that proposition, and the dicta of Lord Dunedin and Lord Mersey (6) which are relied upon as showing that an infringement of clause (*b*) does not make the transaction void are not consistent with the general proposition stated by Lord Macnaghten (7) that "if, in violation of the plain words of the Act, a money-lender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided." That language refers to s. 2, sub-s. 1 (*a*) and (*b*). The House of Lords professed to follow and not to overrule the principle of the decisions in *Cope* v. *Rowlands* (8) and *Fergusson* v. *Norman.* (9) The decision of the Court of Appeal in *Gadd* v. *Provincial Union Bank* (10), following a previous decision of this Court, is still good law. The transaction therefore being void, the defendant would, before the Money-lenders Act, 1911, have had a good defence to the plaintiff's claim on the promissory note, and is consequently "prejudiced

(1) [1910] A. C. 514.
(2) Ibid. 520, 521.
(3) Ibid. 525.
(4) Ibid. 533, 534.
(5) [1910] 1 K. B. 868, 891.
(6) [1910] A. C. 527, 534—536.
(7) Ibid. 521.
(8) (1836) 2 M. & W. 149, 157.
(9) (1838) 5 Bing. N. C. 76, 84.
(10) [1909] 2 K. B. 353.

by virtue of" the Act of 1911, and is entitled to be indemnified by the money-lender.

*Rigby Swift, K.C.*, in reply.

*Cur. adv. vult.*

July 28. SWINFEN EADY L.J. read the following judgment :— At the trial before Ridley J. without a jury the defendant Cornelius recovered judgment against Phillips, third party, for 310*l.* and costs, and against this judgment the third party appeals. He is a registered money-lender with Isadore Phillips as his registered name and 33, Crown Street, Liverpool, as his registered address.

On November 24, 1914, about 9.30 A.M., the defendant Cornelius was seated at breakfast in his house at Seaton, Formby. His friend Harvey Shelmerdine called upon him and asked him to back a bill for him so that he could obtain some money, as he was hard up. After some conversation the defendant consented to do so. It was then suggested that they should go out for a walk together, and as they were walking in the direction of the Blundell Arms Hotel Shelmerdine suggested that they should go into the hotel, as his friend, who would lend him some money, was there. They did so, went into the hotel, and found Phillips there. The defendant had not seen him before and did not know that he was a money-lender. Shelmerdine introduced him as his friend, who would lend him some money. Shelmerdine had said nothing previously about borrowing from a money-lender. Two promissory notes were produced, and Cornelius signed one which Phillips took. It was a promissory note for 300*l.* in favour of Isadore Phillips payable six months after date. It is dated Liverpool. Phillips' registered address does not appear on the note. The other promissory note for the same amount was signed by Shelmerdine and given to the defendant. Phillips drew a cheque for 200*l.* in favour of the defendant, signing it " I. Phillips." The defendant indorsed it and immediately handed it to Shelmerdine, who received the whole amount. Thus the transaction was entirely begun and ended on this day at Formby, away from the registered office of Phillips, and without the defendant being aware that he was dealing with a money-lender.

Shortly before the promissory note became due Phillips transferred it to one Finegold, who upon the maturity of the note brought

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an action upon it against Cornelius. Having regard to the provisions of the Money-lenders Act, 1911, s. 1, the defendant had no defence against Finegold. The defendant communicated with Harvey Shelmerdine's father, and the father paid to the defendant 300*l.* generally on account of a much larger sum of money which Harvey Shelmerdine owed to the defendant. With this amount the defendant paid his debt to the plaintiff, and then claimed indemnity against Phillips under the Act of 1911, s. 1, sub-s. 1. The defendant contends that he is a person prejudiced by that enactment, as but for that statute he would have had as good a defence against Finegold as he had against Phillips, namely, that the transaction was void, as in entering into it Phillips was carrying on his money-lending at an address elsewhere than his registered address, 33, Crown Street, Liverpool. Ridley J. adopted this view and gave judgment for the defendant against Phillips for 300*l.* and interest, and it is against this judgment that the present appeal is brought.

The transaction would certainly appear to be within the mischief against which the Money-lenders Act was intended to provide. Lord Loreburn said in *Kirkwood* v. *Gadd* (1): "The mischief is that this dangerous business may be conducted by persons under false names or a variety of names without the security of an ascertained address, or at places where men may be taken unawares or off their guard." This language seems peculiarly appropriate to the present case. The defendant is induced to deal with Phillips without knowing that he is a money-lender and without knowing that he has any registered office. But the appellant has contended that, as this transaction which was carried out entirely apart from the registered office was the only transaction of that kind proved against him, it cannot be said that he is "carrying on the money-lending business" at some address other than his registered address, as such phrase involves a series of transactions. It is further contended that, even if this transaction is carrying on business, and in breach of s. 2, sub-s. 1 (*b*), of the Act of 1900, although the money-lender may have subjected himself to a penalty under sub-s. 2 of the same section, yet the transaction is not rendered invalid by the section.

It was decided by the House of Lords in *Kirkwood* v. *Gadd* (2)

(1) [1910] A. C. 423. (2) [1910] A. C. 422.

that the Act of 1900, s. 2, sub-s. 1 (*b*), does not require that every stage, every incident, and every detail of a money-lending transaction shall be transacted at the registered office. Such a construction would render the Act unworkable. In that case the application for the loan was by letter sent to the registered address, and some letters making the appointment at the borrower's residence with a view to arranging the loan were written to and received from the registered address. The House of Lords held that upon the facts of that case there had not been any breach of the Act of 1900, and at the same time pointed out that the question whether a money-lender was carrying on business elsewhere than at his registered address was a question of fact, the answer to which depended upon the circumstances of the case, and Lord Loreburn and Lord Atkinson each pointed out that a single transaction might amount to carrying on business elsewhere than at the registered address. In the Court of Appeal (1) the same case had been dealt with on the footing that the entirety of the isolated transaction—which was undoubtedly a transaction in the way of the business of the defendants as money-lenders—was carried on otherwise than at the defendants' registered address. The House of Lords, while taking a different view of the facts, did not show any dissent from the judgment of the Court of Appeal on the question of law, namely, that if the whole transaction had been carried out from start to finish away from the money-lenders' registered address, the Court might hold that the provisions of s. 2, sub-s. 1 (*b*), of the statute had been contravened. Both Fletcher Moulton L.J. and Farwell L.J. expressed this view, and I concur in it.

With regard to the contention that the money-lender is only forbidden to carry on the money-lending business at some place which may properly be called his "address," other than his registered address, I may add to what Fletcher Moulton L.J. said (2) that, in addition to the negative of any other place being implied in the enactment that he shall carry on the money-lending business at his registered address or addresses, there is imposed by sub-s. 2 a penalty upon the money-lender if he carries on business "elsewhere than at his registered address"; this assists in making it clear that s. 2, sub-s. 1 (*b*), prohibits a money-lender from carrying on business

(1) [1909] 2 K. B. 353, 358. (2) Ibid. 357.

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at any other place than a registered address, whether such other place is or is not a place at which the money-lender can be said to have "an address."

In my opinion Phillips in entering into the transaction in question in this action was carrying on his money-lending business elsewhere than at his registered address, and in fact at another address—to wit, at the Blundell Arms, Formby—in breach of the statute.

There remains the question whether the transaction so entered into is rendered void by the Act of 1900. The question which the House of Lords had to determine in *Whiteman* v. *Sadler* (1) was whether a transaction entered into by a money-lender when he was offending against a provision of s. 2 of the Act was invalidated by that Act. In that case the facts were that Arthur Whiteman was first registered as an individual money-lender under the name of "Cox & Co.," and subsequently as a partner with Walter Whiteman under the name of "Cobb & Co.," and the transaction in question was carried out under the name of "Cobb & Co." Now s. 2, sub-s. 2, imposes a penalty on a money-lender carrying on business "in more than one name or elsewhere than at his registered address." Lord Macnaghten said (2): "It seems to me that the Court of Appeal was perfectly right in holding that a man who under different names, carries on one business as an individual, and another as a member of a partnership firm, does carry on business in more than one name." So that in entering into the particular transaction as a member and under the name of Cobb & Co. he was committing an offence against the Act for which there was an appropriate penalty. Nevertheless the House of Lords determined that the contract was not rendered void by the Act. Lord Macnaghten and Lord Dunedin both in terms expressed approval of the principle thus enunciated by Farwell L.J. (3), "that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party thereto who seeks to enforce it." Where they differed from him was in the application of that principle to the Money-lenders Act of 1900. Thus Lord Macnaghten said (4): "No one questions the principle to which Farwell L.J. refers. The application of the principle, however, in any particular

(1) [1910] A. C. 514.
(2) Ibid. 520.
(3) [1910] 1 K. B. 891.
(4) [1910] A. C. 521.

case must depend on the provisions of the Act of Parliament under consideration, and the circumstances of that case." And Lord Dunedin said (1): "To the principle, as stated, I do not think any exception can be taken, except that it might, indeed, be amplified by the insertion of the words 'or impliedly' after 'expressly.' But there always remains the question whether the contract is expressly or impliedly forbidden by Act of Parliament. This is not always an easy question. It is simple enough where a certain contract is prohibited. But what of the cases where nothing is said about the contract as such, but certain duties or prohibitions are imposed on certain classes of persons? Are the contracts made by such persons who have failed in their duties or contravened the prohibitions impliedly prohibited, and therefore made illegal by Act of Parliament?" The case then before the House was one in which nothing was said in the Act about the contract as such, but a certain prohibition was thereby imposed on a certain class of persons, namely, money-lenders, and the prohibition was against carrying on business in more than one name, which the money-lender had been doing when entering into the transaction in question. Lord Dunedin then pointed out (2) that in the Act of 1900, s. 2, sub-s. 1 (*c*), there is a direct prohibition of any agreement or security taken by the money-lender otherwise than in his registered name, and said: "It seems to me that express enactment shuts the door to further implication. 'Expressio unius est exclusio alterius.' I come therefore to the conclusion that the contract here was only void if it was struck at by the prohibition in s. 2 (1.) (*c*)." He then held that it was not so struck at, as, although the registration was improper, the security had been taken in the de facto registered name of the money-lender. The result was that a breach of the money-lender's duty, by carrying on business in more than one name, did not avoid the contract, and that there was not any breach of (*c*) (which breach would have avoided the contract), as the security had been taken in the de facto registered name of the money-lender. The Lord Chancellor (Lord Loreburn) and Lord Ashbourne agreed with the opinion of Lord Dunedin. They also agreed with the opinion of Lord Macnaghten, and I am unable to appreciate that there is any divergence between the views of Lord

(1) [1910] A. C. 525. (2) Ibid. 527.

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Macnaghten and Lord Dunedin as has been suggested. Certainly neither Lord Loreburn nor Lord Ashbourne considered them inconsistent, as they agreed with each of them. The passage in Lord Macnaghten's judgment which it has been suggested points in a different direction to Lord Dunedin's opinion is (1): "If, in violation of the plain words of the Act, a money-lender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of any one who chooses to attack him, and his contracts are rightly avoided." I understand Lord Macnaghten in this passage to be referring to contracts in violation of s. 2, sub-s. 1 (*c*), namely, agreements or securities taken by a money-lender otherwise than in his registered name, either because he has not been registered at all, and therefore has no registered name, or, having been registered, takes the security or agreement in some other name than his registered name. But these contracts are the same ones as Lord Dunedin states are avoided by the direct prohibition in s. 2, sub-s. 1 (*c*). There is therefore a unanimous decision of the House of Lords that although the statute provides (s. 2, sub-s. 2) that "If a money-lender carries on business in more than one name or elsewhere than at his registered address" he shall be liable on conviction to a penalty, nevertheless a contract entered into by him when carrying on business in more than one name is not thereby avoided. In my opinion the same result must follow when the contract in dispute is entered into by the money-lender when carrying on business elsewhere than at his registered address. Such a contract is not avoided by the statute.

The fact that the money-lender is in terms required by s. 2, sub-s. 1 (*b*), to carry on the money-lending business at his registered address or addresses and at no other address does not carry the matter any further. The question still remains whether, if he fails in this duty, his contract is made illegal and avoided by the Act, and, having regard to *Whiteman* v. *Sadler* (2), this question must in my opinion be answered in the negative. Lord Mersey also said (3) that Farwell L.J. had stated the principle quite accurately, but that the question must always arise, Does the statute by implication

(1) [1910] A. C. 521. (2) [1910] A. C. 514.
(3) Ibid. 534.

forbid the contract? And the answer depends exclusively on the terms of the statute. And he added (1) that, even assuming that the money-lenders were guilty of a breach both of (*a*) and (*b*), he did not think that they thereby rendered void the contract which was there in question.

It was urged that, if that were the effect of the House of Lords' decision in *Whiteman* v. *Sadler* (2), it would have made a material alteration in the law as enunciated by Parke B. in *Cope* v. *Rowlands* (3) and by Tindal C.J. in *Fergusson* v. *Norman*. (4) In the latter case the distinction is pointed out between duties imposed with regard to the particular contract in question and duties collateral to the individual contract; and it was urged that the attention of the House of Lords could not have been directed to the fact that in entering into the particular contract there under the name of "Cobb & Co." Arthur Whiteman was acting in direct breach of the statute, and that such a contract must have been impliedly forbidden by the statute. This argument cannot be acceded to. The point was obviously present to the minds of the noble and learned Lords. Lord Dunedin himself drew attention to the fact that Arthur Whiteman was already registered as Cox & Co. (5) when he was again registered as a member of Cobb & Co., and Lord Macnaghten in the passage already cited affirmed the decision of the Court of Appeal that Arthur Whiteman was carrying on business in more than one name.

I am of opinion that the effect of the judgment of the House of Lords is that contracts entered into by money-lenders when acting in disobedience to clause (*b*) are not impliedly prohibited and made void.

In my judgment the appeal should be allowed and judgment entered for the third party with costs here and below.

PHILLIMORE L.J. read the following judgment:—The defendant Cornelius had a friend named Shelmerdine to whom he had lent considerable sums of money, only a small portion of which had been repaid. One morning Shelmerdine called upon him at his house,

(1) [1910] A. C. 536.
(2) [1910] A. C. 514.
(3) 2 M. & W. 149, 157.
(4) 5 Bing. N. C. 76, 84.
(5) [1910] A. C. 523.

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got him to come out for a walk, and suggested that he should back a bill for him, offering as some inducement that he would be able then to repay him some part of his loan. He spoke of a friend who would lend the money on the two names, and as they were passing an hotel invited him to come in, saying the friend was there. The friend was Phillips, the third party in this action. Cornelius then and there signed a promissory note in favour of Phillips for 300*l.*, and received from Shelmerdine his note for 300*l.* and from Phillips a cheque drawn in his favour which he indorsed to Shelmerdine. Strange to say, he appears never to have seen the face of the cheque or to know that it was for 200*l.* only, that being the amount which was obtained upon his promissory note for 300*l.* repayable in six months. Before the note matured Phillips assigned it to the plaintiff Finegold. Finegold sued Cornelius upon the note, and as he appeared to be the holder for value without notice, and not to be a money-lender himself, there was, since the Money-lenders Act, 1911, no defence to Finegold's claim. Cornelius has paid it, and now seeks under s. 1 of the same Act to claim indemnity against Phillips, the money-lender, for the debt and costs which he has had to pay to Finegold. I have said that Cornelius has paid Finegold. A point was made at the trial that it was not Cornelius but Shelmerdine's father who had paid Finegold. I think that the learned judge, Ridley J., was quite right in deciding against this contention.

There remains the question whether Phillips is liable to indemnify Cornelius. Ridley J. has held that he is so liable, and Phillips has appealed. Phillips is a money-lender registered as such, with a registered address at 33, Crown Street, Liverpool. The transaction, and the whole of the transaction, between Cornelius and Phillips took place at the Blundell Arms Hotel, Formby. These are the findings of Ridley J. with which I agree. This being so, the question we have to decide is whether the transaction is rendered void by s. 2 of the Money-lenders Act of 1900. Sub-s. 1 of that section provides that a money-lender (*a*) shall register himself as such; (*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses and at no other address; and (*c*) shall not enter into any agreement in the course of his business

as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name.

It is contended on behalf of Cornelius that if the money-lending contract between Cornelius and Phillips was brought about by Phillips acting contrary to any of the prohibitions contained in this sub-section it is void, and Cornelius can obtain his indemnity from Phillips. It is said for Phillips that, although this particular act of money-lending was done at the Blundell Arms and not at his registered address, still it was an isolated transaction and did not amount to a carrying on by him of the money-lending business at the Blundell Arms.

There have been many decisions upon the validity of contracts carried on by a money-lender in a name other than his registered name, or in a name which, though in fact registered, ought not to have been registered, or carried on at an address other than the registered address. The two matters of name and address are not precisely on an equal footing, because, though both are covered by par. (*b*) of the sub-section, there is the special provision as to certain portions of the transaction being carried out in the registered name which are covered by par. (*c*). I do not forget the distinction between the cases of name and the cases of address. It will be found that in all the decided cases it is in the actual transaction impeached that the money-lender has violated or is alleged to have violated the provisions of the section. No transaction has, I think, been impeached—none has been successfully impeached—where the money-lender has not violated the provisions of the section in the particular transaction and is only said to have violated it in other transactions. It would seem to follow that if the money-lender has in the particular transaction violated the provisions of the section it would be of no avail for him to prove that it is an isolated transaction, and that his habit is to comply with the section. It is said that this may well be so when the point turns upon the name of the money-lender because of the express provisions in par. (*c*), but that par. (*b*) is like par. (*a*), and that both deal with the general calling of the money-lender and the way in which he habitually carries on his business; and that (*b*) strikes only at the habit and not at the individual act. It seems to me that we have to distinguish

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between prosecutions for the offence of contravening the Act and questions raised inter partes when the validity of a particular contract is impeached. If it be of importance to borrowers that they should have every assistance to enable them to identify the particular money-lender who may have a character for rapacity, for unfairness in dealing, or the contrary, and if to assist identification a money-lender is required to have a registered name and address and to carry on business in that name and at that address, it is immaterial to the particular borrower that in ninety-nine cases out of a hundred the money-lender carries out his transactions correctly, if in the hundredth case—being that of the borrower—he conceals his identity.

I adopt the quotation from Lord Loreburn in *Kirkwood* v. *Gadd* (1) which occurs in the judgment of Swinfen Eady L.J. It would be small consolation for a victim of this mischief to know that he was the only victim, or to feel that if there were two or three more victims the money-lender would be in danger of being deemed to have formed a habit of violating the statute, and so in time come under par. (*b*).

I think we should construe the words "the money-lending business" as meaning "the particular business of money-lending which is under consideration," and that this (or according to the decisions a material part of this) must be carried on at the registered address as well as in the registered name to make it valid. I regard par. (*c*) as an additional protection. In a complicated scheme of money-lending there are frequently instruments to which some third person is a party. This third person, while appearing to be independent, may be a dummy, or may be the money-lender under an alias. It is to prevent the money-lender from saying "I have complied with the statute, I have lent the money in my registered name, the business has been carried on at my address, it does not matter that some portion of the transaction, some particular instrument, has been carried out in a concealed name," that (*c*) was enacted.

In my view none of the decided cases interfere with the construction that I propose to put upon par. (*b*), while there is authority of appreciable weight in its favour.

(1) [1910] A. C. 423.

*Kirkwood* v. *Gadd* (1) was much relied upon on behalf of Phillips. The decision there was that the particular transaction could not be impeached because some items of it were carried out away from the money-lender's address. This was the view which, I may humbly say, I in common with several judges of the King's Bench Division had already taken. The particular decision of mine which has found its way into the reports was in the case of *Levene* v. *Gardner*. (2) Other cases are referred to in Matthews' and Spear's Supplementary Notes to the Money-lenders Act, 1900, p. 16. No doubt two of the noble Lords who gave judgment in *Kirkwood* v. *Gadd* (1) expressed themselves as if it was a further point for the money-lender that it was not shown that the particular contract of loan was other than an isolated transaction. Lord Atkinson in particular (3) seems to go as far as to say that an isolated transaction of money-lending carried out from its inception to its conclusion at a wrong address may stand. I do not think that Lord Mersey goes so far. I doubt whether he was considering any question except practical ones, such as that, if a loan transaction involve the giving of security by a bill of sale on furniture, part of the transaction, such as taking an inventory, must be carried on at the house of the borrower, and not at the address of the lender, or that if the borrower be bedridden the money-lender must either come or send to his house. However this may be, the decision in *Kirkwood* v. *Gadd* (1) does not preclude me from deciding as I propose to decide.

In *Whiteman* v. *Sadler* (4) the question turned on name, not address. The money-lender acted in a registered name. It was a name that ought not to have been registered in the opinion of the majority of the judges in the Court of Appeal and of the noble Lords in the House of Lords. But the House of Lords thought, reversing on this point the Court of Appeal, that as the name had been in fact registered, though wrongly, trading under it was not such a violation of the statute as rendered the contract void. Lord Mersey, who differed from the other noble Lords and the majority of the Court of Appeal, holding that the name was not wrongly registered, does draw a distinction between the prohibitions in pars. (*a*) and (*b*),

(1) [1910] A. C. 422.
(2) (1909) 25 Times L. R. 711.
(3) [1910] A. C. 433.
(4) [1910] A. C. 514.

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which paragraphs he thinks create offences but would not make contracts void, and par. (*c*), which does both. But when his judgment comes to be closely looked into it will be seen that his arguments are mainly drawn from cases of collateral breaches, and not of breaches in the very transaction itself.

My colleagues draw inferences from the language used by some of the noble Lords in *Whiteman* v. *Sadler* (1), inferences which I am not prepared to draw, although I must allow that there are dicta which give rise to difficulties. The question in that case turned upon pars. (*a*) and (*c*). Lord Dunedin, for instance, did not mention (*b*). As there was no question of address, and as every part of the transaction was carried out by the money-lender under one and the same registered name, the only question was, was he entitled to use that name ? If he was for (*b*) so he was for (*c*). If he was for (*c*) so he was for (*b*). If not, not. All that was left of (*b*) not also covered by (*c*) was the provision that he must carry on the money-lending business under no other name or description. Contravention of this provision in other cases (if there was contravention, which was doubtful, as all his business was carried on in one or other of two registered names) did not affect the validity of this transaction, which was carried on in his registered name and was not carried on in a name other than his registered name. His having two registered names was wrong and might subject him to penalties. His doing other business in a name other than the registered name which he was using in this case (whether that other name was registered or not) may have been also wrong, and might subject him to penalties under (*b*) and under sub-s. 2. But contraventions in other matters did not affect the validity of this matter. And this point (if it was in controversy) the Lords decided. It was a collateral illegality. All that has, in my opinion, no bearing where the contravention is in the particular case.

The golden rule, I think, is to consider whether the statute has been violated in the particular case. If it has, evidence that it has not been violated in other cases is inadmissible in a civil action inter partes. If it has not been violated in the particular case, evidence that it has been violated in others is equally inadmissible. Those are matters which, to use the language of Tindal C.J. in *Fergusson*

(1) [1910] A. C. 514.

v. *Norman* (1), "are collateral to the individual contract." It might be otherwise in a criminal prosecution where evidence of habit might be produced to repel a defence of accident or mistake. I am therefore not troubled by *Whiteman* v. *Sadler*. (2)

On the other hand Farwell L.J. in *Blair* v. *Buckworth* (3) indicates his view that, if the transaction attacked was carried out at an address other than the registered address, that transaction alone is to be considered, and so considered is invalid. As he expresses himself, there is "a difficulty in saying that the carrying out of a single transaction at a place which was not the money-lender's registered address was not a violation of the Act. The only thing attacked was that individual transaction, and that individual transaction if not carried out at the registered address seemed to infringe the provision which said that it must be done at no other than the registered address."

When the case of *Gadd* v. *Kirkwood* was before the Court of Appeal under its then title of *Gadd* v. *Provincial Union Bank* (4), Farwell L.J. decided in terms that the "simple case of a single money-lending transaction carried on in its entirety at the borrower's house" is within the prohibitions of par. (*b*), and that the transaction is invalid. Fletcher Moulton L.J. decided to the same effect. The judgment was, as already stated, reversed by the House of Lords, but upon the ground that the transaction was not carried on in its entirety, but only so far as was reasonably necessary, at the borrower's house.

In *Peizer* v. *Lefkowitz* (5), which is since *Whiteman* v. *Sadler* (2) in the House of Lords, Lush J. in the Divisional Court said that par. (*c*) made transactions invalid, but par. (*b*) only subjected the money-lender to penalties. But both Vaughan Williams L.J. and Farwell L.J. treated the prohibitions in par. (*b*) as making the contract invalid, and Kennedy L.J. expressed his agreement with their judgments.

I think that in each case we have to look at the particular transaction, and if it was carried on in its entirety at other than the registered address it is invalid.

Upon these grounds I think the learned judge was right, and that this appeal should fail.

(1) 5 Bing. N. C. 84.
(2) [1910] A. C. 514.
(3) 24 Times L. R. 474, 477.
(4) [1909] 2 K. B. 353, 358.
(5) [1912] 2 K. B. 235.

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BANKES L.J. read the following judgment:—In the present case there is no dispute about the facts. The money-lending transaction in question was entirely carried out at a place other than the registered address of the money-lender. The point was not taken, so I express no opinion upon it, but I think that on some future occasion the question may arise for decision whether a money-lender who is content to pose throughout the money-lending transaction as Mr. So and So's friend, and who never discloses his identity beyond putting forward for signature a document on which his registered name appears as payee, can be said to be carrying on business, so far as the particular transaction is concerned, in his registered name.

It seems clear that the facts bring this case within the mischief intended to be dealt with by the Money-lenders Act of 1900. The question for our decision is whether the facts bring the case within the language of the statute also, and if so, what the effect of that language is. Three points upon the construction of s. 2 of the statute have been argued before us: (1.) as to the meaning of the expression "carry on the money-lending business," and whether those words are satisfied by proof of a single isolated transaction; (2.) as to the meaning of the expression "at his registered address or addresses and at no other address," and whether those words are satisfied by proof of a single transaction taking place elsewhere than at the registered address of the money-lender; (3.) whether, assuming evidence is given that the money-lender has infringed some provision of s. 2, sub-s. 1 (*b*), in regard to the transaction which is impeached, the effect with regard to that transaction is to render it void, or only to subject the money-lender to prosecution. All three questions have been before this Court on previous occasions, some of them on more than one occasion; and this Court has pronounced decisions upon them. It is not, therefore, for us on the present occasion to give any independent judgment, but only to ascertain how far, if at all, the decisions of this Court on these questions have been adopted or dissented from in the House of Lords. The decisions in this Court to which I refer are *Gadd* v. *Provincial Union Bank* (1) and *Sadler* v. *Whiteman*. (2) In the first of these cases all three points were distinctly raised and

(1) [1909] 2 K. B. 353. (2) [1910] 1 K. B. 868.

expressly decided by both the members of the Court upon an interlocutory appeal. In the second of these cases Farwell L.J. dealt with the third point at length and gave a considered judgment upon it. In a later case of *Peizer* v. *Lefkowitz* (1) Farwell L.J. and Kennedy L.J. both expressed opinions on the third point. In each of these cases the views expressed by members of this Court were opposed to the contentions of the present appellant, and the question therefore resolves itself into a consideration of whether in the House of Lords in either of the cases of *Kirkwood* v. *Gadd* (2) or *Whiteman* v. *Sadler* (3) the views of the statute expressed in this Court have been dissented from.

If the appellant's contention with regard to the effect of the decision of *Whiteman* v. *Sadler* (3) is correct, it is not necessary to consider the effect of the decision of *Kirkwood* v. *Gadd*. (2) In *Whiteman* v. *Sadler* (3) the judgments of Lord Dunedin and of Lord Mersey appear to me in terms to decide that the effect of a breach by the money-lender of the provisions of s. 2, sub-s. 1 (*a*) or (*b*), does not invalidate the transaction, even though the breach has occurred in relation to the transaction impeached. I have some difficulty in taking the same view of Lord Macnaghten's language, but as Lord Loreburn and Lord Ashbourne treat the opinions of Lord Macnaghten and Lord Dunedin as being in accord, I think the decision of *Whiteman* v. *Sadler* (3) in the House of Lords must be treated as a decision in the appellant's favour on the point of whether the transaction between the appellant and Mr. Cornelius was avoided, assuming that the appellant had committed a breach of s. 2, sub-s. 1 (*b*), of the Money-lenders Act in relation to the loan. On this ground I think that the appeal succeeds.

*Appeal allowed.*

Solicitors for defendant: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for third party: *Ford, Lloyd & Co., for Barrell & Co., Liverpool.*

(1) [1912] 2 K. B. 235. (2) [1910] A. C. 422.
(3) [1910] A. C. 514.

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*July* 28.

## THE KING *v.* GOVERNOR OF BRIXTON PRISON.
## *Ex parte* SARNO.

*Alien—Deportation—Power of Secretary of State to choose Country to which Alien shall be deported—Validity of Order in Council—Aliens Restriction Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 12), *s.* 1, *sub-s.* 1—*Aliens Restriction* (*Consolidation*) *Order*, 1914, *art.* 12.

By art. 12 of the Aliens Restriction (Consolidation) Order, 1914, made under the Aliens Restriction Act, 1914, a Secretary of State may order the deportation of any alien :—

*Held*, that the article is within the power conferred by the Aliens Restriction Act, 1914, upon His Majesty in Council in time of war or imminent national danger or great emergency to impose restrictions on aliens.

*Semble* that, if it appears to the Court that a misuse of the power conferred upon the Executive is imminent, the Court can, upon an application for a writ of habeas corpus, deal with the matter, even though, in the form in which the application is made, the point is not technically before the Court and the Executive alleges that the applicant is in legal custody.

An alien who is suspected of being of immoral and criminal character may be a person against whom an order of deportation under the article may properly be made as being necessary or expedient with a view to the safety of the realm.

*Quaere* whether the Executive or the alien has the right to choose the country to which he is to be deported.

An affidavit in support of an application for a writ of habeas corpus contained a statement by the applicant that he "escaped from Russia for political reasons" at a date when he was about seventeen years of age :—

*Held*, that the bare statement of the applicant that he was a political refugee, unsupported by any evidence, was not sufficient to entitle the Court to order the writ to issue.

Rule Nisi obtained at the instance of the applicant, one Sarno, a Russian, calling upon the respondent, the governor of Brixton Prison, to show cause why a writ of habeas corpus should not issue directed to him to have the body of Sarno immediately before the Court.

An order had been made by the Home Secretary under the powers conferred by the Aliens Restriction Act, 1914, and art. 12 of the Aliens Restriction (Consolidation) Order, 1914,

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that Sarno, "an alien, shall be deported from the United Kingdom"; and by a warrant issued by the Home Secretary by virtue of the same powers, he ordered Sarno to "be arrested and taken to a ship for deportation, and if no such ship shall be available" to be "taken to one of His Majesty's Prisons and therein" to be "detained until the arrangements for his deportation shall be completed." Sarno had been arrested under this warrant and was detained in Brixton Prison.

In support of his application Sarno made an affidavit which (so far as material) stated that he was illegally arrested, and since his arrest had been detained in the Tottenham Court Road Police Station. He was aged thirty-three and was born in Russia, from whence he "escaped for political reasons in or about the year 1900." He alleged that he was prepared to join the British Army as a combatant.

An affidavit made by the head of the department in the Home Office dealing with the administration of the Aliens Restriction Act, 1914, and the Orders in Council thereunder and filed on behalf of the respondent stated (so far as material) that it is considered to be contrary to the comity of nations for one country in the exercise of any power which it possesses of ridding itself of undesirable aliens to send them or knowingly to permit them to go to any country other than that of which they are nationals; that, according to information supplied to the Home Office by the police, the applicant was a Russian who had no regular employment, but assisted in keeping a house which was the resort of alien thieves and bullies and of prostitutes of various nationalities. He was suspected of having committed at least one theft and of living on the immoral earnings of women, and to deport such individuals or knowingly to allow them to go to any country other than their own might lead to representations being made by the Governments of the countries aggrieved.

The grounds upon which the rule was obtained were (inter alia) (1.) that art. 12 of the Aliens Restriction (Consolidation) Order, 1914, was ultra vires the Aliens Restriction Act, 1914; (2.) that the applicant was never given any opportunity to leave the United Kingdom; (3.) that there was no power in the Executive to deport the applicant to a particular country; (3.) he urged that, being a Russian refugee, he, in the event of his being deported, should be

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deported to some friendly or neutral country other than Russia; (4.) that the Order under which he was arrested for deportation was invalid and illegal, in particular because it was dated July 24, 1916, at which time the applicant was being detained at Brixton Prison.

By s. 1, sub-s. 1, of the Aliens Restriction Act, 1914, which is entitled "An Act to enable His Majesty in time of war or imminent national danger or great emergency by Order in Council to impose Restrictions on Aliens and make such provisions as appear necessary or expedient for carrying such restrictions into effect," it is enacted that "His Majesty may at any time when a state of war exists between His Majesty and any foreign Power, or when it appears that an occasion of imminent national danger or great emergency has arisen, by Order in Council impose restrictions on aliens, and provision may be made by the Order . . . . (*c*) for the deportation of aliens from the United Kingdom . . . . (*k*) for any other matters which appear necessary or expedient with a view to the safety of the realm."

By art. 12, clause 1, of the Aliens Restriction (Consolidation) Order, 1914, made under the Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12), s. 1, sub-s. 1, "A Secretary of State may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the United Kingdom."

Clause 2: "Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, and whilst being conveyed to the ship, and whilst on board the ship until the ship finally leaves the United Kingdom, be detained in such manner as the Secretary of State directs, and, whilst so detained, shall be deemed to be in legal custody."

*Sir F. E. Smith, A.-G.*, and *Branson* showed cause. The applicant has no ground for applying for a writ of habeas corpus. Under art. 12 of the Aliens Restriction (Consolidation) Order, 1914, there is power conferred upon a Secretary of State to order the deportation of any alien and to detain him until the ship by which he is to be conveyed leaves. The applicant is therefore an alien in respect of whom a deportation order has been made and he is detained according

to the order of a Secretary of State. In the Act of 1914 the wider expression "deportation" is substituted for "expulsion," which was used in the Aliens Act, 1905 (5 Edw. 7, c. 13). Clause 2 of art. 12 of the Aliens Restriction (Consolidation) Order, 1914, confers power upon the Secretary of State to exercise any degree of control over an alien ordered to be deported until he can be conveniently conveyed to and placed on board a ship about to leave the United Kingdom. If the Secretary of State is not entitled to choose the country to which the alien is to be deported, the alien himself must have the right of choice. That would lead to the most extravagant consequences. The alien might choose some inaccessible island. In the Oxford English Dictionary the meaning of the word "deportation" is given as "The action of carrying away; forcible removal, *esp.* into exile; transportation." It is true that the word "leave" in art. 12, clause 1, of the Regulations is not very apt with regard to a person who is being deported. But the Legislature intended by its use to impose a duty upon the alien in order that he might become liable to the penalties prescribed by the Act of 1914 if he remained in the United Kingdom. Whenever exile has been included amongst punishments by any State it has always been assumed that the Executive has the power to determine where the exiled person shall go. Suppose the applicant chose France, it would be unreasonable to expect that country to consent to receive a man of his character. When sentences of transportation were imposed it was never suggested that the person sentenced had the right to choose the place to which he should be sent. It was the intention of the Legislature that in times like the present, when, in the language of s. 1, sub-s. 1, of the Act of 1914, "an occasion of imminent national danger or great emergency" has arisen, the Secretary of State should have the most complete discretion. The effect of art. 12, clauses 1 and 2, is that, if the Executive considers it safe for the alien to be at large until he leaves the United Kingdom, clause 1 applies; but if the Secretary of State thinks it is not safe, then he may detain the alien under clause 2. There is no obligation on the Executive to tell the alien that he must leave the United Kingdom or to give him an opportunity of leaving. As the applicant is "deemed to be in legal custody" under clause 2 of art. 12, a writ of habeas corpus will not

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lie. If it were held that under clause 1 of art. 12 the alien alone can select the country to which he is to go, no useful purpose would be served by the article.

Upon the affidavits there is no foundation for the suggestion that the Secretary of State is using his powers for the purpose of sending back to his own country a political refugee. The applicant's affidavit states in the vaguest possible manner that he is a political refugee and that therefore he ought not to be sent back to Russia. There is no corroboration of his story, and, having regard to the fact that he must have been about seventeen years old when he left Russia, the inference that he is a political refugee ought not to be drawn. If the unsupported affidavit of the applicant were to be acted upon the result would be that it would be impossible to deport any person who chooses to state in an affidavit that he is a political refugee.

*Rigby Swift, K.C.*, and *Caradoc Rees*, in support of the rule. Art. 12 of the Aliens Restriction (Consolidation) Order, 1914, is ultra vires. The Aliens Restriction Act, 1914, does not say that an alien may be deported at the discretion of a Secretary of State, but art. 12 does say so, and on that ground is ultra vires.

Sub-s. 3 of s. 1 of the Act of 1914, which enacts that "Any provision of any Order in Council made under this section with respect to aliens may relate either to aliens in general or to any class or description of aliens," shows that any Order in Council made under the section ought to relate either to aliens in general or to some class or description of aliens, and art. 12 does not comply with that requirement, although all the other articles do. It was not the intention of the Legislature that the Executive should have the power to deal with an alien as if he had no rights.

It is clear from the affidavits that the order in the present case was made not because the applicant is a danger to the realm, but because he is an undesirable person. Even if art. 12 is not ultra vires, neither the article nor the Aliens Restriction Act, 1914, confers the power of dealing with an alien in the manner in which the applicant has been treated. The Executive is exercising a power given to it for the purpose of securing the safety of the realm merely with the object of obtaining a new method of summary jurisdiction over an individual who is considered undesirable. The whole object of the Act of 1914 appears from clause (*k*) of s. 1, sub-s. 1, of the Act;

and that object is that, having regard to the existing state of war, Orders in Council may be made containing such provisions as are necessary for the safety of the realm. The applicant has not broken any regulation made with regard to aliens generally. The mere fact that he may have committed some offence under the Criminal Law Amendment Act, 1885, does not justify the Executive in saying in substance " Because you are an alien we will deport you instead of allowing you to have a trial."

Upon the true construction of art. 12, clause 1, the alien has the right to choose the country to which he shall be deported. [*Rex* v. *Halliday* (1) was also referred to.]

*Branson* in reply. It is impossible to confine the operation of the Aliens Restriction Act, 1914, to aliens who are in fact prejudicial to the safety of the realm. It must at least apply to aliens who may be prejudicial to its safety. But if the Court should be of opinion that the regulation applies only in cases where in the opinion of the Executive deportation is necessary for the safety of the realm, the applicant is a person against whom it applies. To expel an undesirable alien is to do an act which is expedient with a view to the safety of the realm. The police force has become largely depleted, and every person who can be released from watching suspected individuals helps to add to the numbers available for munition work or military service, and thus tends to secure the safety of the realm.

LORD READING C.J. This case raises important questions with regard to the powers of the Secretary of State under the Aliens Restriction (Consolidation) Order, 1914, made in pursuance of the Aliens Restriction Act, 1914.

During the course of the arguments questions have been raised and discussed, which are undoubtedly of supreme importance, in reference to the right or power of the Secretary of State to send back to the country where he was born a person who has sought asylum in this country by reason of his having, or being suspected of having, committed a political offence in his own country. It may be thought that during the arguments underlying suggestions have been made that the applicant, a Russian, was to be sent back to Russia by the Executive of this country for the purpose of being

(1) [1916] 1 K. B. 738.

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dealt with there as a political refugee, or for the purpose of being compelled to undertake some military service in Russia which might lead to a similar result, he being a political refugee. I desire to make it quite clear that in my judgment no such case is raised upon the facts before us, and any opinion which I am expressing is not intended to cover that case, and I express no opinion upon it.

The rule nisi contains a number of grounds upon which the release of the applicant is claimed, only two of which arise in this case. The first is that art. 12 of the Aliens Restriction (Consolidation) Order, 1914, is ultra vires upon the ground that the Aliens Restriction Act, 1914, does not confer power upon the King in Council to make it. The second is that the power, if valid, has been misused. [Having read clauses 1 and 2 of art. 12, his Lordship continued :]

In the present case an order of deportation has been made against the applicant. But it is contended upon his behalf that that order is either invalid because regulation 12 is ultra vires or because it is intended to misuse the powers granted to the Secretary of State. The title of the Aliens Restriction Act, 1914, under which the article was made, is " An Act to enable His Majesty in time of war or imminent national danger or great emergency by Order in Council to impose Restrictions on Aliens and make such provisions as appear necessary or expedient for carrying such restrictions into effect." It received the Royal assent and became law on August 5, 1914, the day after the declaration of war. In that title and in the opening words of s. 1, sub-s. 1, which enact that His Majesty may by Order in Council impose restrictions on aliens, very wide and general language is used. The sub-section continues : " and provision may be made by the Order "—after setting out a number of special matters—" (*c*) for the deportation of aliens from the United Kingdom." Therefore the Legislature has enacted that provision may be made by Order in Council imposing restrictions on, and making provision for the deportation of, aliens from the United Kingdom. We must assume that the Legislature used that very wide language knowingly and with the intention of covering wide ground and altering the law as it had hitherto existed with regard to aliens, at the same time providing that that altered law should only be operative in time of imminent national danger or great emergency or when a state of war exists between this country and a

foreign Power. By s. 1, sub-s. 6, it is expressly provided that these powers are to be in addition to any other powers of His Majesty which already exist.

I am unable to find any justification for the contention that art. 12 goes beyond the powers conferred by the statute. It appears to me that the language of the article shows that it is framed in accordance with the powers conferred by statute, and that the whole scope of the statute was to give extraordinary powers to the King in Council whereby he could confer upon the Secretary of State extraordinary powers in dealing with aliens; and I can find no limiting words. We are only entitled to look at the language for the purpose of construing the statute, and I must come to the conclusion that by that very general language the Legislature intended to give to His Majesty in Council wide powers—in any event, such powers as justified the making of art. 12.

On behalf of the appellant the further point was taken that, assuming art. 12 is not ultra vires, the powers it confers are being misused by the Executive. In a sense it may be said that in the form in which this application comes before the Court that point is not strictly before us, but we do not think that we are bound to apply the rules with strict regard to technicality. If we were of opinion that the powers were being misused, we should be able to deal with the matter. In other words, if it was clear that an act was done by the Executive with the intention of misusing those powers, this Court would have jurisdiction to deal with the matter. But in the present case, having regard to the material before us, I cannot conclude that there has been or is contemplated any misuse of the powers. It appears from the affidavit of the Assistant Secretary in the Home Office that, according to information supplied to the Home Office by the police, the applicant has no regular employment, but assists in keeping a house which is the resort of alien thieves and bullies and of prostitutes of various nationalities. Further, he is suspected of having committed at least one theft and of living on the immoral earnings of women. That is in substance the evidence before us. It does not amount to evidence of commission of crime, but it is evidence of suspicion on the part of the police, upon which no action could be taken of the ordinary criminal character, because

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that would require legal evidence equally in the case of an alien as in that of a British subject.

But, having arrived at the conclusion that the applicant is suspected of being a person of that character, it seems to me that there is no justification for saying that the Secretary of State is not entitled to use the wide powers given to him under the Aliens Restriction Act, 1914, to deport him—in other words, to send him out of this country. I can conceive that an act which in time of peace could not fairly be described as a danger to the safety of the realm might fairly be so described in time of war, as for instance if a person commits, or even if he is merely suspected of committing, a crime. Although his actual offence may be merely the commission of a crime, nevertheless in time of war, when all the activities of persons engaged in police protection and in bringing criminals to justice must necessarily be restricted because of the demand that has been made upon persons of military age, the commission of crime may contribute to endanger the safety of the realm, and in time of war suspicion may justify action which could not be justified in time of peace. In my judgment the authorization of action such as I have mentioned was the object of making art. 12 of the Order. It was for the same reason that the regulation so much discussed in *Rex* v. *Halliday* (1), which affected persons of British as well as of foreign origin, was made. It is unavoidable that incidents should happen in time of war which would, in truth, shock the majority of persons in this country in time of peace. In my judgment, therefore, there is no justification for the contention that there has been a misuse of the powers conferred upon the Executive. I must add that, on the applicant's affidavit, I am not satisfied that he is, in the ordinary sense, a political refugee. He merely says that he "escaped" from Russia "for political reasons" in 1900. His age is now thirty-three, so that at that time he must have been between the ages of sixteen and seventeen. In my judgment, upon the material before us, namely, the affidavit of the Assistant Secretary of the Home Office, there was sufficient ground for the exercise of his powers by the Secretary of State, and consequently the applicant is not illegally detained in prison.

(1) [1916] 1 K. B. 738.

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I make the following observations in order that my decision may not be misunderstood hereafter. Upon behalf of the applicant it has been said that it is the intention of the Executive to deport him to Russia without giving him the opportunity of going elsewhere, and it has been contended that the Aliens Restriction Act, 1914, and the Order in Council deal only with "deportation . . . . from the United Kingdom," and that those words mean that the person to whom they refer must under clause 1 of art. 12 "leave" the United Kingdom, but that it is nowhere to be found in the statute or regulations that he is to be deported to his country of origin, but that the obligation upon a person who is the subject of an order of deportation is under clause 1 of art. 12 immediately to leave this country. It is contended that that is the meaning of the words in clause 1 of art. 12, "shall forthwith leave and thereafter remain out of the United Kingdom." During the arguments it was stated (but there is no evidence of it) that the applicant is ready and wishes to leave this country, and that his intention is to go to Holland or Switzerland, and that therefore it could not be said that he had committed any breach of the obligation imposed upon him to leave the United Kingdom under art. 12. There is not a tittle of evidence in support of that contention, and therefore the point does not arise and I express no opinion upon it. It is an important matter, and one upon which I will only say that when it becomes necessary to give judgment upon it the question whether it would be straining the language of the article to hold that there is power to deport an alien to his country of origin even though he is willing to leave the United Kingdom is left open. It does not arise in this case, because there is not one tittle of evidence which raises it, and it is not one of the grounds which are elaborately stated in the rule nisi as drawn up. That fact would not necessarily prevent us from considering it, but it throws light upon the object of this application and the intention which the applicant had when the matter was first brought before us. The rule must therefore be discharged.

AVORY J. I am entirely of the same opinion and reserve my judgment upon the point which my Lord has indicated. It must therefore not be taken that I express any opinion upon the question

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whether the words in art. 12 "any alien with respect to whom such an order is made shall forthwith leave the United Kingdom" confers upon him the absolute right to choose where he shall go to.

Low J. I wish, before parting with this case, emphatically to protect myself from being supposed to assent to some of the arguments which have been used at the Bar. For instance, I do not agree that if the Executive were to come into this Court and simply say "A person is in our custody, and therefore the writ of habeas corpus does not apply because the custody is at the moment technically legal," the Court would have no power to consider the matter and, if necessary, deal with the application for the writ. In my judgment that answer from the Crown in reply to an application for the writ would not be sufficient if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power. The arm of the law in this country would have grown very short, and the power of this Court very feeble, if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject as that proposition involves.

I agree that art. 12 is within the powers conferred by the statute, and it is therefore only necessary to add that this decision must not be thought to determine the question as to what this Court could do if there were a deliberate attempt by the exercise of the powers conferred by the statute and regulations to enforce the return of a real, genuine, political refugee to the country of his origin. In the present case I am not satisfied that the applicant is really a political refugee at all. He states in the vaguest possible terms that he escaped from Russia "for political reasons" at a time when he must have been of about the age of seventeen. He does not condescend to tell us what offence it was suggested he had committed or what he was alleged to have done against the laws of Russia. He merely, in the vaguest terms, asserts that he escaped for political reasons. We should require much more than a bare statement of that nature before we could come to the conclusion that a person really was a political refugee.

Subject to these remarks I agree entirely with the judgments which have been delivered by the other members of the Court.

*Rule discharged.*

Solicitor for applicant: *Albin Hunt.*

Solicitor for respondent: *Solicitor to the Treasury.*

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WEBB, APPELLANT *v.* BAKER, RESPONDENT.

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*Oct.* 12, 13.

*Public Health—Unsound Food—Rejection under Contract of Article supplied by Vendor—Obligation of Vendor to remove Article within Seven Days—"Possession" of Article by Vendor after Rejection—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117.

By a contract made between the appellant and poor law guardians the appellant undertook to supply goods to, and deliver them at, a workhouse. The goods were, as regards quality, to be such as the guardians approved. Rejected goods were to be removed by, and at the expense of, the appellant within seven days after notice to him of their rejection. In purported fulfilment of an order given by the guardians under the contract the appellant delivered at the workhouse a quantity of rabbits which were intended for the food of man, but which were in fact unsound and unfit for the food of man. The guardians gave immediate notice of rejection to the appellant, and on the same day the rabbits were seized by an inspector of nuisances and duly condemned and ordered to be destroyed. The appellant was convicted under s. 117 of the Public Health Act, 1875, for having unlawfully deposited for the purpose of sale rabbits which were intended for the food of man and which when in his possession had been lawfully seized and condemned:—

*Held*, without deciding whether the rabbits had been deposited by the appellant for the purpose of sale, that the conviction must be quashed inasmuch as the rabbits at the time of their seizure were not in his possession within the meaning of that term in s. 117.

The word "possession" in s. 117 must be construed in a popular and not in a narrow sense.

CASE stated by justices for Middlesex sitting at Brentford.

The appellant was charged under the Public Health Act, 1875 (1), by the respondent with having, on October 13, 1915, at the Brentford

(1) Public Health Act, 1875, s. 116: "Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase meat . . . . exposed for sale, or deposited in any place for the purpose of sale, or of preparation

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Union Workhouse, unlawfully deposited for the purpose of sale twenty-two rabbits intended for the food of man, then belonging to him and which were when in his possession lawfully seized by the inspector of nuisances and afterwards were duly adjudged to be unsound and unfit for the food of man and were condemned and ordered to be destroyed.

The appellant, a provision merchant in the city of London, entered into a contract on September 29, 1915, with the Brentford guardians for the supply of rabbits for the half-year ending March 31, 1916. By that contract the rabbits were to be best English wild rabbits and at the price therein mentioned. The following were the material clauses of the conditions annexed to the contract :—

"2. The goods or materials to be supplied under this contract are to be of the quality or sort before mentioned, and such as the guardians or their officers duly authorised shall approve.

"3. The goods or materials are to be delivered at the workhouse . . . . or other institutions of the union, free of charge to the guardians, and at the contractor's risk, in such quantities or numbers, at such times and in such manner as the guardians or their officers duly authorised shall from time to time order.

"4. Rejected goods or materials are to be removed by and at the expense of the contractor within seven days after notice shall have been given him of the rejection. If not so taken away, the guardians may cause the goods or materials to be removed, and charge the contractor with all expenses incurred in such removal."

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for sale, and intended for the food of man . . . . ; and if any such animal carcase meat . . . . appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same . . . . in order to have the same dealt with by a justice."

Sect. 117: "If it appears to the justice that any animal carcase meat . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding twenty pounds for every animal carcase . . . . so condemned, or, at the discretion of the justice, without the infliction of a fine, to imprisonment for a term of not more than three months . . . ."

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In pursuance of an order given by the guardians to the appellant under the contract twenty-two rabbits, skinned and packed in a wooden case, were delivered at the Brentford Workhouse, Isleworth, on October 13, 1915, at 10.17 A.M., and on the case being opened immediately on its arrival in the presence of the master of the workhouse the rabbits were found by him to be in a bad and stinking condition. The master thereupon telephoned to the appellant's manager, informing him of the condition of the rabbits, stating that he must reject them under the contract, and asking whether the appellant would send for them or whether he (the master) should have them destroyed. The manager would neither agree to send for the rabbits nor to have them destroyed, as he asserted that they were quite fresh and that he and the appellant had seen them packed on the previous afternoon. The master reported the matter to the guardians, who were then sitting, and received their instructions to call in the district medical officer of health. At 12.15 P.M. on the same day the medical officer and the inspector of nuisances inspected the rabbits at the workhouse and found them to be in such an advanced state of putrefaction and so tainted and affected by maggots that in the medical officer's opinion they must have been unsound and unfit for the food of man on the previous afternoon. The inspector of nuisances seized the rabbits and took them on the same day before a justice of the peace, who adjudged them to be unsound and unfit for the food of man and ordered them to be destroyed. Later on the same day the master of the workhouse told the appellant over the telephone what had happened, when the appellant said he could not understand how the rabbits could be in the condition alleged as he had seen them packed on the day previous, but that possibly they might have been by a fire at the railway station. The appellant and one witness gave evidence that the rabbits had been skinned and despatched by the appellant from the Central Market in the city of London at 4.30 P.M. on October 12, 1915, by the London and South Western Railway to Brentford Workhouse, but that by mistake the case containing them was first taken to Liverpool Street Station and then to Waterloo. The appellant did not call evidence to prove that the rabbits were not deposited by him at the workhouse for the purpose of sale or were not intended for the food of man.

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The justices found the following facts: (*a*) That the rabbits were deposited at the Brentford Workhouse by the appellant for the purpose of sale and intended for the food of man, and were then unsound and unfit for the food of man; (*b*) that when seized by the inspector of nuisances the rabbits were in the appellant's possession; and (*c*) that the rabbits were duly seized by the inspector of nuisances and were lawfully condemned and ordered to be destroyed as being unsound and unfit for the food of man. On these findings the justices convicted the appellant and imposed a fine.

The questions for the opinion of the Court were whether there was any evidence that the rabbits had been deposited for sale by the appellant at the workhouse, and whether there was any evidence of an offence under the Public Health Acts.

*Macmorran, K.C.* (*Naldrett* with him), for the appellant. No offence was committed by the appellant under s. 117 unless there was evidence, first, that he deposited the rabbits for the purpose of sale, and, secondly, that they were in his possession at the time they were seized. In this case there was no evidence on either point to justify a conviction. First, the rabbits were not deposited by the appellant for the purpose of sale inasmuch as they had already been sold. The property in, and possession of, the rabbits passed to the guardians when they were delivered to the railway company for carriage to Brentford Workhouse. Secondly, the rabbits were not in the possession of the appellant at the material time. "Possession" in s. 117 means physical possession. In the Scottish case of *Cairns* v. *Linton* (1) it was decided that a farmer in Perthshire who despatched to a consignee in Edinburgh the carcase of a bull which on examination in Edinburgh was found to be unfit for human food was not in possession of the carcase in Edinburgh either actually or constructively within the meaning of a local Act containing a section substantially the same as s. 117 of the Public Health Act, 1875. [He also referred to *Rendell* v. *Hemingway* (2) and *Bothamley* v. *Jolly*. (3)]

*Disturnal, K.C.* (*Morle* with him), for the respondent. The conviction was right inasmuch as the rabbits were deposited for the purpose of sale by the appellant and were in his possession at the

(1) (1889) 16 R. (J.) 81. (2) (1898) 14 Times L.R. 456.
(3) [1915] 3 K. B. 425.

time of their seizure. "Deposit for the purpose of sale" is a perfectly general expression and is not a term of art. It simply means placing goods in some place in contemplation of a sale. In this case the rabbits were brought to the workhouse by the appellant, and it was for the guardians to say whether or not they complied with the requirements of the contract. They were brought there for the purpose of being sold to the guardians. [He cited *Williams* v. *Allen* (1) and *Young* v. *Grattridge*. (2)]

Secondly, the rabbits remained in the possession of the appellant. By s. 36 of the Sale of Goods Act, 1893, the buyer, unless he otherwise agrees, is not bound to return rejected goods; it is sufficient if he intimates to the seller that he refuses to accept them. In this case the rabbits were rejected under clause 4 of the conditions annexed to the contract, intimation thereof was given to the appellant, and therefore the legal position is that the property in, and the possession of, the rabbits remained with him. The mere fact that under clause 4 the rabbits might remain for a time at the workhouse after their rejection does not affect the legal liability of the appellant, as the rabbits till their removal were held by the guardians subject to his control or for him or on his behalf: see s. 1, sub-s. 2, of the Factors Act, 1889. That was the position in the case of *Bull* v. *Lord* (3), where the owner of unsound meat was convicted of having it in his possession although it was physically in the possession of another person. On the intimation to the appellant that the guardians had rejected the rabbits they were at his risk, and if any unauthorized person had removed them from the workhouse the guardians could not have maintained trover.

*Macmorran, K.C.*, in reply. To satisfy s. 117, which, it must be remembered, is highly penal, there must be a deposit for the purpose of sale at the place of deposit. Here the sale was already concluded when the goods were despatched: see *Lambert* v. *Rowe*. (4) As to "possession," that word is to be interpreted in a popular sense, and it means physical possession. In this case the rabbits were in the physical possession of the guardians. [*Firth* v. *McPhail* (5) was also referred to.]

(1) [1916] 1 K. B. 425.
(2) (1868) L. R. 4 Q. B. 166.
(3) (1908) 9 L. G. R. 829.
(4) [1914] 1 K. B. 38.
(5) [1905] 2 K. B. 300

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VISCOUNT READING C.J. By a contract in writing which contained certain conditions the appellant contracted to supply the Brentford guardians with best English wild rabbits which were intended for the food of man. It is clear that what was sold under the contract were not specific goods, but only goods which were to be of a particular description and, of course, were to be of merchantable quality. On October 13, 1915, in purported fulfilment of the contract, twenty-two rabbits were delivered at the workhouse, but as they were found to be in an advanced state of putrefaction the guardians immediately communicated with the appellant, who was the vendor under the contract, and rejected them. Upon the evidence we must take it that the rabbits were unfit for human food when they were sent in pursuance of the contract. The guardians called in the inspector of nuisances, and under the powers contained in ss. 116 and 117 of the Public Health Act, 1875, the rabbits were condemned and destroyed. Thereupon a summons was issued against the appellant for a contravention of s. 117, for having unlawfully deposited for the purpose of sale the twenty-two rabbits which were intended for the food of man but were unfit for that purpose, and which were seized when in his possession.

Two points have been raised—first, whether there was evidence to justify the finding by the justices that the rabbits were deposited for the purpose of sale by the appellant on the date in question, and, secondly, whether, when the rabbits were seized by the inspector of nuisances, they were in the possession of the appellant. Both questions must be answered as the justices answered them if the conviction is to be affirmed. If we come to the conclusion that the rabbits were not deposited by the appellant for the purpose of sale within the meaning of the statute the conviction cannot stand, notwithstanding that the rabbits might be in the possession of the appellant at the material time, and, equally, if we hold that the rabbits were deposited for the purpose of sale by the appellant but were not in his possession at the material time the conviction cannot stand. We have had an interesting argument on both points, but, having regard to the view we take on the second point, it becomes unnecessary to decide, and we do not propose to decide, the first point.

Upon the second point we have come to the conclusion that

there was no evidence to justify the finding that the rabbits were at the material time in the possession of the appellant. There is no doubt considerable force in the contention, based upon a strict and somewhat narrow construction of the word "possession," that there was sufficient evidence to support the justices' finding; but in our view the word "possession" in s. 117 should be given a popular, and not a narrow, construction, and, giving the word that construction, we cannot say that the rabbits were in the possession of the appellant within s. 117 during the period that they remained, under clause 4 of the conditions of the contract, with the guardians after their rejection, with merely an obligation on the appellant to remove them within that period. That being so, the conviction cannot stand whatever might be our view upon the other point.

RIDLEY and LOW JJ. concurred.

*Appeal allowed.*

Solicitor for appellant: *Wilfred Firth, Brentford.*
Solicitor for respondent: *Charles Robinson, Hounslow.*

J. S. H.

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*Oct.* 13.

## SIDNEY *v.* NORTH EASTERN RAILWAY COMPANY.

*Lands Clauses Acts—Arbitration—Special Case stated by Arbitrator—Costs of—Lands Clauses Act*, 1845, *s.* 34—*Arbitration Act*, 1889, *s.* 24; *Sched. I., par.* (*i.*).

The fact that an arbitrator in an arbitration under the Lands Clauses Act, 1845, could not have stated a special case for the opinion of the Court before the passing of the Arbitration Act, 1889, does not prevent the costs of such a special case from being "incident to" the arbitration within the meaning of s. 34 of the earlier Act. Such costs are not in the discretion of the arbitrator under Sched. I., par. (i.), of the Arbitration Act, but must be borne by the promoters, unless the sum awarded is equal to or less than that offered by them.

Trial of action before Avory J.

The defendant railway company took compulsorily under their statutory powers certain land belonging to the plaintiff. No sealed offer of compensation was made by the defendants, and the question of compensation went to arbitration under the Lands Clauses Act, 1845. A question of law having arisen in the course of the arbitration, the arbitrator made an award in the form of a special case for the opinion of the Court under s. 19 of the Arbitration Act, 1889, and, the case having been heard, the Court remitted it with their opinion thereon (1) to the arbitrator, who thereupon made his final award, dated August 12, 1914. In that award he made no direction as to costs, but left them to be dealt with under s. 34 of the Lands Clauses Act, 1845, which provides that "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters." The plaintiff's bill of costs was taxed under the Lands Clauses (Taxation of Costs) Act, 1895 (58 Vict. c. 11), and the taxing Master certified the amount at 476*l.* 10*s.* 8*d.*, which sum included the sum of 169*l.* 12*s.* 2*d.*, the costs of the special case. The plaintiff brought this action to recover the amount so certified. The defendants disputed their liability to pay the 169*l.* 12*s.* 2*d.*, but admitted liability for the balance of the certificate and paid that amount into Court.

(1) [1914] 3 K. B. 629.

*Schofield* (*Disturnal, K.C.*, with him), for the plaintiff. The liability of the promoters to pay the costs of the special case is governed by s. 34 of the Lands Clauses Act. Such costs are costs "of the arbitration and incident thereto" within the meaning of that section. In *In re Knight and Tabernacle Permanent Building Society* (1) it was held that the costs of such a special case were included under similar words, "the costs of the reference and award," in Sched. I., par. (i.), to the Arbitration Act, 1889. That paragraph of the schedule to the Arbitration Act no doubt provides that "The costs of the reference and award shall be in the discretion of the arbitrators or umpire," but by s. 24 of that Act the Arbitration Act is to apply to an arbitration under another Act only in so far as the Arbitration Act is not "inconsistent with the Act regulating the arbitration." Here the Act regulating the arbitration is the Lands Clauses Act, and when once it is established that the costs of the special case are costs incident to the arbitration within s. 34 of that Act, the provision of the Arbitration Act which says that the costs shall be in the discretion of the arbitrators is necessarily inconsistent with s. 34 of the Lands Clauses Act, which says that the costs shall be borne by the promoters. The latter Act therefore applies, and the defendants are liable to pay these costs.

*Courthope Munroe, K.C.*, and *Latter*, for the defendants. The contention of the plaintiff is that in every case of compulsory taking of land in which there is no sealed offer of compensation, if the claimant can persuade the arbitrator to state a special case he will get the chance of that case being decided in his favour without any risk to himself in the matter of costs, for the costs of the special case will in any event have to be borne by the promoters. That seems so unreasonable that the presumption is against the Legislature having intended such a result. It is contended by the defendants that "the costs of" the "arbitration and incident thereto" must be understood as limited to costs which were incident to an arbitration under the Lands Clauses Act in 1845. As Lord Esher M.R. said in *Sharpe* v. *Wakefield* (2) with regard to the rule of construction to be applied to a statute, "It is that the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other

(1) [1892] 2 Q. B. 613. (2) (1888) 22 Q. B. D. 239, 242.

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construction is to be adopted or has altered the previous statute." The day after the passing of the Lands Clauses Act the costs of a consultative special case could not have been incident to the arbitration, for no such special case could by law be stated before the Arbitration Act, 1889, and the same Act which gave power to consult the Court also gave the arbitrator power to deal with the costs. In *In re Knight and Tabernacle Permanent Building Society* (1) Kay L.J. said: "I should have no doubt that, when an arbitrator for his own guidance asks for an opinion, the costs of obtaining such opinion would be costs of the reference and award in his discretion." The costs of a special case are no doubt incident to an arbitration generally, but for the reasons given they are not incident to an arbitration under the Lands Clauses Act. Under those circumstances there is no inconsistency between the Arbitration Act and the Lands Clauses Act, and the incidence of these costs must consequently be governed by the former Act.

*Disturnal, K.C.*, in reply. If the defendants are right the costs of typewriting a copy of the proceedings would not be incident to the arbitration, typewriting not having been invented in 1845. The words "incident thereto" cannot be confined to what was in use in 1845. The fact that the Lands Clauses (Taxation of Costs) Act, 1895 (58 Vict. c. 11), which was passed subsequent to the Arbitration Act, provides new machinery for the taxation of costs of an arbitration under the Lands Clauses Act shows the Legislature was under the belief that the incidence of the costs provided by the Act of 1845 had survived the passing of the Arbitration Act.

AVORY J. In this case there has been an arbitration under the Lands Clauses Act, 1845. In the course of that arbitration the arbitrator exercised his power under s. 19 of the Arbitration Act, 1889, and stated a special case for the opinion of the Court upon a question of law arising in the course of the reference. The Court expressed its opinion upon that question of law, but made no order as to the costs of the special case. It had been decided by the Court of Appeal in *In re Knight and Tabernacle Permanent Building Society* (2) that where a case has been stated by an arbitrator under s. 19 for the opinion of the Court, whether it has been so stated

(1) [1892] 2 Q. B. 621. (2) [1892] 2 Q. B. 613.

voluntarily or under an order compelling him to state it, the Court has, upon the hearing of the case, no jurisdiction over the costs, except where, the case having been compulsorily stated under an order, the Court made it a term of that order that it should have power to deal with the costs ; and that was not the case here. The arbitrator then made his final award, which also was silent as to costs, and the plaintiff carried in his bill of costs before a Master of this Court for taxation under the Lands Clauses (Taxation of Costs) Act, 1895. The Master gave his certificate that he had taxed the costs of the plaintiff at 476*l.* 10*s.* 8*d.*, which included the sum of 169*l.* 12*s.* 2*d.*, the costs of the special case submitted to the Divisional Court. The present action was then brought to recover the total amount of the costs, 476*l.* 10*s.* 8*d.* The defendants admitted liability for 306*l.* 18*s.* 6*d.* and paid that sum into Court, but disputed their liability for the 169*l.* 12*s.* 2*d.* The question that I have to determine is whether the defendants are liable to pay the costs of the special case. Now it has been clearly decided in the case to which I have already referred—*In re Knight and Tabernacle Permanent Building Society* (1)—that the costs of such a special case are costs of and incident to the arbitration. But it was contended by Mr. Courthope Munroe that, although that is true generally, the costs of a special case stated in an arbitration under the Lands Clauses Act, 1845, form an exception to the rule, and that such costs are not incident to the arbitration within the meaning of s. 34 of that Act, upon the ground that the words of that section are to be read as limited to such costs as could in point of law be incident to the arbitration at the time when the Act was passed in 1845. It is true that, as Lord Esher said in *Sharpe* v. *Wakefield* (2), an Act must be construed as it would have been construed the day after it was passed, but that does not conclude this case. Suppose that the telephone had been invented just after the Act of 1845 was passed, could any one doubt that the Court, being called upon to construe the Act, would have included the costs of a telephone message, although at the time of the actual passing of the Act there was no such thing? If the contention of the defendants were sound it would exclude the costs of typewritten documents, which have become part of the ordinary costs of litigation at the present

(1) [1892] 2 Q. B. 613. (2) 22 Q. B. D. 239, 242.

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day, though typewriting was unknown in 1845. It remains only to consider the provisions of s. 24 of the Arbitration Act, 1889. That section provides that "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration." Is then Sched. I., par. (i.), of the Act of 1889 inconsistent with s. 34 of the Act of 1845 which regulates the arbitration in this case? Clearly it is. Therefore when once it is conceded that the costs of the special case were incident to the arbitration it follows that the costs must be dealt with under the provisions of the Lands Clauses Act and not under those of the schedule of the Arbitration Act. There must be judgment for the plaintiff.

*Judgment for plaintiff.*

Solicitors for plaintiff: *Flux, Leadbitter & Neighbour.*
Solicitor for defendants: *R. F. Dunnell.*

J. F. C.

[IN THE COURT OF APPEAL.]

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## TAYLOR *v.* POWELL DUFFRYN STEAM COAL COMPANY, LIMITED.

*Employer and Workman—Compensation—Death by Accident—Dependency—Total or partial—Common Fund—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

A woman who had been deserted by her husband went with her three children by him to live with another man, by whom she had an illegitimate child. This man earned 45*s.* a week, which he paid to her and which she applied in the maintenance of the household. Her husband subsequently joined the Army, and she then received from the War Office a separation allowance of 23*s.* a week. The man with whom she was living was killed by an accident arising out of and in the course of his employment by the respondents. Upon an application by his infant illegitimate child for compensation under the Workmen's Compensation Act, 1906 :—

*Held*, in the absence of evidence that the mother of the applicant placed any part of her separation allowance to a common fund for the maintenance of the family, that the applicant was totally dependent upon her father and entitled to compensation upon that footing.

APPEAL from an award of the judge of the Merthyr Tydfil County Court upon an arbitration under the Workmen's Compensation Act, 1906.

The applicant (who sued by her mother as her next friend) was the illegitimate infant daughter of one Norman Frederick Price, who met with his death by an accident on December 20, 1915, while in the employment of the respondents. Her mother, Martha Taylor, was the wife of Reuben James Taylor, to whom she was married in 1901, and by whom she had been deserted in 1912 after having had three children by him, all of whom were still living.

In 1912 she obtained a separation order under which Taylor was ordered to pay her 12*s.* 6*d.* a week. Nothing had been paid under that order. In August, 1912, Martha Taylor commenced to cohabit with Price, and continued to do so down to the time of his death. The applicant was the child of this union, and was born on October 10, 1914. Price registered the birth of the child in his

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own name, and himself insured its life. He gave almost the whole of his wages, amounting to about 45*s.* a week, to Martha Taylor, reserving only a small amount of pocket money for himself. Martha Taylor, her three children by Taylor, Price, and the applicant all lived together, Martha Taylor providing for the household expenditure out of the money given to her by Price.

In September, 1914, Taylor joined the Army, and since that time Martha Taylor had received from the military authorities a separation allowance of 23*s.* a week, and was still in receipt of the same.

In the county court it was contended on behalf of the respondents that the applicant was only partially dependent upon the deceased. The county court judge came to the conclusion that the moneys received by Martha Taylor from the War Office and the moneys received by her from Price were used by her indiscriminately for the maintenance of Price, herself, and her children (including the applicant), all of whom lived as one family; and that on the authority of *Main Colliery Co.* v. *Davies* (1) the applicant was at the time of the death of the deceased maintained by the moneys derived by the mother from both sources, and was not therefore totally dependent on either source. He accordingly made an award of partial dependency in favour of the applicant for 120*l.*

The applicant appealed.

*Parsons, K.C.*, and *Harold Morris*, for the appellant. This case is not within *Main Colliery Co.* v. *Davies.* (1) If there be a family fund contributed by various members of the family, on the death of the father it is competent to hold that any particular dependant is not wholly dependent on the father: *Hodgson* v. *West Stanley Colliery.* (2) In that case the presumption that the wife was wholly dependent upon her husband was overruled, and she was held entitled to say that she was partially dependent upon each of her two sons as well as on her husband. If it were the fact that Martha Taylor contributed the 23*s.* a week to the family fund it might be held that the applicant was only partially dependent upon her father; but that is not the case. Martha Taylor became fortuitously in receipt of a temporary allowance from the War Office for herself and her three daughters by Taylor. *Harris* v. *Powell*

(1) [1900] A. C. 358. (2) [1910] A. C. 229.

*Duffryn Steam Coal Co.* (1) was cited and distinguished by the county court judge, but there is no evidence here that the 23*s.* a week was applied for the benefit of the applicant. The true test is to be found in *Pryce* v. *Penrikyber Navigation Colliery Co.* (2), which was approved by Lord Shaw in *Hodgson* v. *West Stanley Colliery* (3), namely, that the question of dependency turns upon whether what the workman was earning at the time of his death was the sole source to which the dependants could look for maintenance at that time. Supposing that it had been Taylor who had been killed, would any claim on behalf of the applicant in respect of his death have been recognized ? The answer is in the negative. It is not every contribution which is brought into the fund which is to be taken as affecting the question of dependency : *Montgomery* v. *Blows.* (4) If this War Office allowance had been contributed to the family fund it might be that Price himself, but not the applicant, would have been partially dependent upon the money. The county court judge was wrong in holding that the allowance was contributed to the family fund, but even if it were, that would be no justification for holding that the applicant's statutory rights were thereby affected. There is only one answer to the question upon whom was the applicant dependent, namely, her father. [*Orrell Colliery Co.* v. *Schofield* (5), *Lloyd* v. *Powell Duffryn Steam Coal Co.* (6), and *Gourlay* v. *Murray* (7) were also referred to.]

*T. W. H. Inskip, K.C.*, and *Shakespeare*, for the respondents. There may be dependency in two ways—either the actual receipt of money or support, or a reasonable expectation of receiving it. Where a dependant in fact receives support from two sources there cannot be total dependency on either. It is true that one source may be so small as to be of no pecuniary value, and the county court judge may so treat it ; but that is a question for him. In *Main Colliery Co.* v. *Davies* (8) Lord Halsbury said : " My Lords, I am unable to see that there is anything in this case beyond a mere question of fact. . . . . What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance

(1) (1915) 9 B. W. C. C. 93.
(2) [1902] 1 K. B. 221.
(3) [1910] A. C. 229.
(4) [1916] 1 K. B. 899.
(5) [1909] A. C. 433.
(6) [1914] A. C. 733.
(7) 1908 S. C. 769 ; 1 B. W. C. C. 335.
(8) [1900] A. C. 358, 362.

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as a family seems to me to be the only thing which the county court judge could properly regard." It was assumed in this case that the 23*s.* a week went into the common family fund, and the only question before the county court judge was as to the dependency of the child. The notice of appeal does not allege that there was no evidence that the money was so applied. Assuming that it was, it follows that the applicant was only partially dependent upon Price, and it becomes a question of quantum. If that be not assumed, then the case should go back to the county court. But it is submitted that the county court judge had materials before him upon which he was justified in awarding partial dependency.

*Parsons, K.C.*, in reply.

LORD COZENS-HARDY M.R. This is an appeal from a decision of the learned county court judge, his Honour Bryn Roberts, and upon it a question arises under very peculiar circumstances. Mrs. Taylor was married some long time ago, and she had three children. Her husband deserted her and eventually disappeared, and an order was made by the magistrates that he should pay something to her and her children, but he paid nothing. The wife having been deserted in 1912, Mrs. Taylor in the same year went with her three children and lived with a man named Price. Shortly after that her husband, Reuben Taylor, enlisted, and one result of the enlistment must have been, I suppose, that he described himself as a married man and Martha Taylor as his wife. At all events, an allowance was made to the wife by the War Office authorities of a sum of 23*s.* a week. That allowance was made on the footing that she was, as in truth she was, the legitimate wife of Reuben Taylor, and that she had three children by him. In fact she was living with Price, and a child was born of that union in October, 1914, in the house where she was living with Price. In December, 1915, Price met with an accident and was killed. In those circumstances, what is the position of the present applicant, his child by Mrs. Taylor? The claim was made in the proceedings on behalf of the infant, by her mother as her next friend, alleging total dependency, and the answer of the employers obviously was addressed not to the question of total or partial dependency, but to the question of paternity, namely, whether the applicant was really the

deceased man's illegitimate child. The learned county court judge heard the evidence on that point. The evidence was quite overwhelming, and he has found as a fact that the applicant is the illegitimate child of Price. That being so, she is admittedly a dependant. Then the question comes, What is she entitled to? Prima facie she is entitled to compensation on the footing of total dependency, and unless evidence is given to prove some different state of circumstances, total dependency follows as a matter of course. But then it is said that we must assume in a case like this, Price being apparently a man who did his duty to his family,—he seems to have paid to Mrs. Taylor, who was living with him as his wife, all his wages, which were fairly large, except what has been called his tobacco money—that after this money came from the War Office as an allowance a common fund was established, and that therefore the infant was dependent to some extent upon the money which the mother received in respect of the allowance of 23*s.* a week. I am not disposed to make any presumption or assumption at all on the point. The point was not present to the minds of the parties when the proceedings were taken. They fought the issue of legitimacy or illegitimacy and whether Price was really the father of this illegitimate child. That issue was decided in favour of the infant. Why should any presumption be made upon a point which could so easily have been proved if there was any substance in it? For the mother was called, and she was not asked in the least about what was done with the 23*s.* a week or any part of it, whether it went into a common purse or a common fund, or whatever you call it. She was cross-examined by the employers, and, although we have not got a note of the cross-examination, counsel tells us that according to a note taken by his client not a single question of that kind was asked in cross-examination of the mother. In those circumstances I am not disposed to assume that the mother, who was receiving from Price ample wages to maintain the family, applied the money which she got from the War Office in relieving the father, Price, of his obligation to maintain his family. He went on paying her his full wages, less only tobacco money, just as he had done before. The question should have been raised definitely by the employers if they intended to take any ground like that.

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Having regard to that finding, counsel for the respondents admit that there is an end of the case and that if that finding is right this appeal must succeed. That being so, I am not sure that it would be right for me to say much more about the case, but I certainly do not at present desire it to be taken that I am by any means clear that the same result would not have been arrived at if there had been a common fund made of this money. This money was really paid by the War Office for the benefit, no doubt, of the wife, the mother, but also for the other three children, the three legitimate children, and it is rather startling to say that that sum either largely or even partly should have been applied or treated as income upon which this infant might be supposed to be dependent, or that we have any right to assume that it would have been applied for its maintenance. The safest ground for us to proceed upon is that in fact the contention which has been raised on behalf of the respondents cannot be successfully raised, because there is no evidence to support it. Apart from that, I do not desire to express any concluded opinion as to what would be the result if it had been proved to be a common fund. In my opinion the appeal must be allowed with the usual consequences, and I suppose it must go back to the learned county court judge to fix the amount.

PICKFORD L.J. I am of the same opinion. I rest my judgment entirely on what is perhaps rather a narrow ground, and that is that I cannot see on the note, or on the information that we have as to the cross-examination of the plaintiff which is not upon the note, any evidence that this 23*s.* a week formed part of the common fund by which the household was supported. I daresay it did. In most cases it would be used like the rest of the money. In some cases it might not, but if the employers wished to have the advantage of the windfall which came to the wife, who had been deserted by her husband, in consequence of his enlisting, to make it a windfall for their benefit instead of hers, I think that they ought to have shown clearly and distinctly by the evidence given before the county court judge that they were entitled to it. I cannot see any such evidence. If I could see clearly that the whole trial had proceeded on the assumption that this money was spent as part of the common fund, although no actual evidence was given, because in that case it would

be unnecessary, I do not say that I should be of a different opinion as to whether they were entitled to avail themselves of it at all, but I cannot see clearly on the note that they did proceed upon any such assumption. Therefore I agree that this appeal should be allowed. I do not think it necessary to express any opinion at all as to what would be the state of things if it were shown that the 23*s.* had been used as part of the common fund.

WARRINGTON L.J. I agree. The real question which I think we have to determine is whether the child can be regarded as partially dependent on the separation allowance made to the mother. On that point I think there was no evidence at all on which the county court judge could come to the conclusion that this allowance was in fact applied towards the maintenance of the infant. There was no evidence before him except the receipt by the mother of the allowance, and no attempt was made to prove how that allowance was expended or otherwise dealt with by the mother. The father, on the other hand, paid the whole of his wages, as he had done throughout the period during which he had been living with the mother, to her for the maintenance of the house. I think there was no evidence, therefore, on which the learned county court judge was entitled to come to the conclusion that this child was in fact partially dependent on the separation allowance made to the mother. With regard to the other point, if we were entitled to assume that the allowance had been paid into the common fund and had been used in the same manner as the father's wages, I only desire to say this, that I am not satisfied that even in that case the child could have been regarded as partially dependent upon this precarious and casual allowance made for the special purpose of maintaining the mother and the other daughters being the wife and children of the soldier Taylor. I agree that the matter must go back to the learned county court judge.

*Parsons, K.C.* The order will be: Appeal allowed with costs, the case to go back to the county court judge to assess the compensation on the footing of the infant being wholly dependent on the earnings of the father.

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LORD COZENS-HARDY M.R. Yes. There is one point of the order that I wish to call attention to. I think it is almost universal now in the case of infants to pay the money to the Public Trustee. It is not for us to make any such order, but it may be suggested to the learned judge that he should consider whether he does not think it right that the money should be paid to the Public Trustee.

Solicitors for appellant: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Downing, Handcock, Middleton & Lewis, for Reginald Harrison & Hann, Cardiff.*

G. A. S.

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[IN THE COURT OF APPEAL.]

## WITHERS *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

*Employer and Workman — Compensation — Accident — Depression — Insanity—Suicide—Chain of Causation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

In order to show that suicide has been caused by injury resulting from accident so as to give a claim for compensation it is necessary to prove that the suicide was caused by insanity and that the insanity was the direct result of the accident, not an indirect result caused by brooding over the accident; and for this purpose the difference between legal and medical insanity is immaterial.

A workman met with an accident and his recovery was slow; he became depressed and melancholic through absence of work and committed suicide. The judge held that there was evidence of insanity from a medical but not from a legal point of view, and that the evidence did not prove that the insanity was caused by the accident; and he refused to award compensation:—

*Held*, that, in the absence of evidence of injury to the brain or that the accident was the cause of the mental symptoms, the award was justified.

The difference between legal and medical insanity is not a sound distinction to be relied on in such a case.

*Malone* v. *Cayzer, Irvine & Co.* (1908) 1 B. W. C. C. 27 followed.

APPEAL from an award of the judge of the Southwark County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of the learned county court judge :—

The deceased man was an engine-driver for the respondents and met with an accident to his right thumb on October 26, 1915. The wound became septic and was a long time healing, and the railway company paid him compensation at the rate of 1*l.* a week. The injury was always local and had no physical effects on the brain. The deceased was very nervous about himself from the first, and after Christmas he began to be depressed and neurasthenic, and this condition gradually got worse up to March. On March 3 he was seen both by his own doctor and by the respondents' doctor. The thumb was then all but well, and he was told that two or three weeks at a convalescent home would probably make him fit for work. There was no doubt that he was most anxious to get back to work and that this was the point he had been worrying about. But even after what he had been told by the doctors he was in an intensely melancholic condition, and talked of going to the workhouse and of being afraid to go home and sit down with his children. On March 4 he had his dinner at home and appeared more cheerful than he had lately been. He went out about 4.15 and walked to Battersea Park Station. He was standing at one end of the platform near the edge as the Brighton express was approaching at 4.33, and he was seen to put up his hands in the attitude of diving and jump head foremost in front of the engine which killed him. He had shown no sign of insanity before the accident of October, and there did not appear to be any record of insanity in the family. His widow and other dependants applied for compensation, and the question was whether his death was the result of the accident.

It was agreed by the parties that this was a case of suicide. The only question at issue was whether the death by suicide resulted from the injury caused by the accident of October 26, 1915.

The learned judge said that it did not appear to have been settled by authority whether suicide even under the influence of insanity could be the result of injury by accident for the purposes of the Act. He did not himself see why it should not be so where there was a clear case of insanity in the legal sense and clear proof of its having been induced by the accident. In such a case it might well be held that the suicidal impulse was a mere symptom of a mental illness

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induced by the injury and that there was no act intervening that was really the man's own. But in the present case he was not satisfied that either of the above matters was proved.

That the man's mind was unsound from the medical point of view was clear, because he was found to be in an intensely melancholic condition after all rational basis for depression was at an end, and his fears as to going to the workhouse and so on were mere delusions. But there was nothing to show that he was incapable of understanding the nature or quality of his act or that his delusions were such as would have justified him had they been facts. Possibly there was some uncontrollable impulse that accounted for the suicide, and this might have been due to the same cause as the other mental symptoms, but that was mere conjecture. As to the connection between the insanity, if any, and the injury, all that was actually proved was that there was no insanity before the injury, that symptoms of neurasthenia began to develop some two or three months afterwards, and that the depression and subsequent delusions centred on the injury and its consequences real or imagined. He did not think this proved that the injury was the cause of the mental symptoms. It was argued that the expert evidence was opposed to this finding and that in the absence of any cross-examination or contradiction he was bound to act on it. The medical evidence only came to this: that neurasthenia was induced by the injury and the consequent enforced idleness, that neurasthenia cases often turned into something which was either insanity or on the border line of insanity, and that the witness believed the suicide was the "outcome" of the neurasthenia. This was by no means the same thing as positive expert evidence that a minor local injury such as that in question could be the cause of insanity in its legal sense or that such insanity in fact existed.

The learned judge held that the suicide was not the result of the accident and refused to give compensation. The dependants appealed.

*Rigby Swift, K.C.*, and *Douglas Knocker*, for the appellants. The learned judge ought to have found that the death of the deceased was the result of the accident and awarded compensation. Death can only have been caused by the accident if it was due to insanity,

and it is shown that that was due to the accident. In this case there is ample evidence that the insanity was due to the accident: *Grime* v. *Fletcher*. (1)

[LORD COZENS-HARDY M.R. That case has no bearing on the present question.]

The death of the deceased was caused by the mental conditions which were the result of his injury: *Southampton Gas Light and Coke Co.* v. *Stride*. (2)

[PICKFORD L.J. I do not think any point was decided in that case which could be useful in reference to any but its own special facts.]

Suicide can be caused by insanity which is the result of a physical accident—*Malone* v. *Cayzer, Irvine & Co.* (3)—although there has been delay in making the claim: *Hoare* v. *Arding & Hobbs*. (4) Here the chain of causation is complete and unbroken. The learned judge held that there was evidence of medical but not of legal insanity; but that holding could only cause confusion; it was of no importance for the decision of the case. The question is whether in the circumstances the workman has acted reasonably: *Shirt* v. *Calico Printers Association*. (5) The evidence of the condition of the workman must be precise: *Eaves* v. *Blaenclydach Colliery Co.* (6)

*J. B. Matthews*, *K.C.*, *Barrington-Ward*, and *P. Guedalla*, for the respondents, were not called upon to argue.

LORD COZENS-HARDY M.R. stated the facts and continued: The death was found to be, and plainly correctly found to be, a suicide. The question is whether that was a consequence of an accident arising out of and in the course of the employment.

It has been said that there is some doubt whether suicide can be the result of an accident within the Workmen's Compensation Act. I confess I do not feel that doubt at all. I have no doubt that it may be. I have no doubt that an accident may be of such a nature that there is a lesion of the brain, a structural injury to the brain itself, which accident may lead to an unsoundness of mind which may directly lead to suicide.

(1) [1915] 1 K. B. 734.
(2) C. A., July 24, 1916 (not reported).
(3) 1 B. W. C. C. 27.
(4) (1911) 5 B. W. C. C. 36.
(5) [1909] 2 K. B. 51.
(6) [1909] 2 K. B. 73.

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I do not think that the law applicable to this case can be better put than it is put in the Scotch Court of Session in *Malone* v. *Cayzer, Irvine & Co.* (1) There are some passages in the judgments which I must read as expressing what, in my view, is the true state of the law. In that case the sheriff-substitute had declined to allow the claim to go to proof because he said that the man had died of suicide and not of the accident. It came before the Court of Session, who said that that was wrong and that it ought to go to proof in order that evidence might be called to say whether the causation was or was not made out. "The claimant," the Lord President said, "will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury. I have some doubts as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach such a conclusion." Then he said he himself was not able to express an opinion upon it. Then Lord M'Laren gives a very valuable judgment. He says (2): "I cannot gather from the sheriff-substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness." The accident caused blindness. "There is no averment of insanity in the physiological sense of a result of disease of the brain, but merely that a man has committed suicide, and is supposed to have done so under some insane impulse." Then he says a little further down, after saying that it must go back to the sheriff-substitute, "I hope the sheriff-substitute will direct his attention to the point whether this is insanity that would be proved by medical evidence of the symptoms, or whether it is anything more than just a mode of stating the supposed cause, because there must be some cause for the suicide." And Lord Kinnear says: "The question whether death has resulted from an accident is always a question of fact."

Applying the law as there laid down, of course it is not enough merely to say this man, who committed suicide some six months after the injury to his thumb, committed suicide; you must show that the suicide was really a result of the accident. There is no physiological injury here which suffices to explain the suicide. It

(1) 1 B. W. C. C. 27. (2) 1 B. W. C. C. 32, 33

is not said that the man's brain was in any way injured. In fact it was not. Mr. Rigby Swift, who has argued this case with great ability, does not suggest that at all. The man's injury was to his thumb, and although occasionally after a certain time he had throbbing pains coming from the thumb up to his head, there is no proof whatever, and no suggestion of proof, of any injury to the brain as such.

But then it is said the man had neurasthenia some two or three months after the injury to his thumb, and that he was depressed, both before and after that, by reason of his desire to get back to his work and his inability to do so. It is said, and quite truly, that it was not his own fault that he did not go back to work; his own doctor and the company's doctor both said that he was not in a fit state to go back; but he had neurasthenia, he had depression of spirits, although it varied from day to day. That is all we know about him. On the particular day when this event took place he was, as described by his wife, less depressed than usual. He ate his dinner at home and seemed to be better; he went out after dinner to see, I suppose, some of his friends and old comrades; he went to Battersea Park Station, and, it may be on a sudden impulse or it may not be on a sudden impulse,—I cannot tell which—he committed suicide.

Now the burden of proof of course lies upon the dependants. The county court judge must be satisfied, and we must be satisfied, so far as it is for us, that the burden of proof has been discharged.

The learned county court judge has given a judgment which on one point, and one point only, seems to me to afford some doubt. He has, if I may be allowed with great respect to say this, somewhat confused himself by attempting to draw a distinction between legal insanity and medical insanity. He says: "This man was, I think, of unsound mind, but he was not of unsound mind in the legal sense." It is a matter of common knowledge that the views of doctors and lawyers always have differed, and I suppose always will differ, on the subject of insanity. I am disposed to think that the cause of his committing suicide was that he was of unsound mind at that time. The lawyers would say that that was so. But then the learned county court judge goes on to say this. He was quite clear in his own mind that there must be a connection between the insanity and

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the injury. Unless the chain of causation, as it has been called, is complete no claim can be made; and he says this: "As to the connection between the insanity, if any, and the injury, all that was actually proved is that there was no insanity before the injury, that symptoms of neurasthenia began to develop some two or three months afterwards, and that the depression and subsequent delusions centred on the injury and its consequences, real or imagined. I do not think this proves that the injury was the cause of the mental symptoms."

In my opinion that is quite correct; at all events we cannot differ from it. Although in the subsequent part, where he deals with legal insanity, he says something which I have a little difficulty in following, I do not think that that in any way affects the main purport of the judgment, or authorizes us to say that he has so misdirected himself that there ought to be a new trial, or that his judgment is so obscure and uncertain that there ought to be a new trial. I have very carefully considered the evidence given by the man's own doctor and by the company's doctor, and I do not think that that evidence really suffices to connect the suicide and the medical insanity, if I may use such a term, directly with the accident; it is post hoc, no doubt, but I cannot say that it is propter hoc.

I think, if we were to assent to the very able and interesting arguments which we have heard, we should be driven to say this, that wherever we find an accident which involves, as so many accidents do, depression of spirits, particularly depression of spirits in the case of a man who has been leading an active life as a labouring man or artisan, depression at being kept from his work and idling about at home, the neurasthenia and the suicide can all be traced directly to the accident. If we were to say that we should be opening a door which, I think, we ought not to open. I think, as the Scotch Court said, that there must be some direct evidence of the insanity being a result of the accident—something more than a subsequent occurrence. The legal causation must be established and proved. To my mind it is not established and proved in this case. In my opinion, though I say it with real regret, the applicants have not made out their case here, and the decision of the learned county court judge cannot be interfered with. The appeal will be dismissed.

PICKFORD L.J. I think it is quite clear that we cannot make an award in favour of the dependants in this case. In fact we were not seriously asked to do so. As to the question whether there ought to be a new trial, I confess I felt considerable doubt for this reason, that I thought there was, at least, a question whether the learned judge, by the distinction which he drew between legal insanity, by which I take it he meant such insanity as would afford a defence in the case of a charge of crime, and medical insanity, which meant an unhinged or insane state of mind, under which the man did things which he otherwise would not have done, had not somewhat confused himself. It seems to me in a case of this kind you must have insanity proved as resulting from, not merely following and not merely perhaps suggested by, the accident. You must have it resulting from the injury in some way. I should be very sorry to say that where you have a nervous state, with no signs of what is really called neurasthenia induced by the shock of the accident, but you have, several months afterwards, insanity produced by brooding over the consequences of the accident, and the anxiety caused by not being able to return to your work at once, that must be taken necessarily to be the result of the accident so as to give compensation. In that part of his judgment which the Master of the Rolls has read the learned judge seems to me to be giving a clear decision apart from the question whether the insanity was legal or medical. He is there speaking of the injury being the cause of the mental symptoms which he himself has found to exist; at least, that is the way I read his judgment. But there is no doubt that in the passage preceding it he has distinguished between the two, and at the end of his judgment he again says, after discussing Dr. Thackwell's evidence, "This is by no means the same thing as positive expert evidence that a minor local injury such as that in question can be the cause of insanity in its legal sense or that such insanity in fact existed."

Now I must say that those two passages have caused considerable doubt in my mind, not by any means altogether removed now, as to whether he has not somewhat confused himself by that distinction which he has drawn, which, I think, is not a sound distinction for the purposes of this case; but he certainly, in the first passage that has been read, does not draw any such distinction, and he merely says "I cannot find that it is proved that the injury was the cause of the

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mental symptoms." I think he was justified in finding that, and when I say justified I mean it was open to him to find that. I cannot agree that, because he says that he accepts Dr. Thackwell's statements, he must therefore, when he comes to consider them with reference to all the other facts that were proved in the case, say that he necessarily accepts Dr. Thackwell's opinions. To accept a medical witness's statements is one thing, to accept his opinions is a very different thing; and I do not think that a learned judge who says "I quite believe what the medical witness is telling me" is also bound to go on to say "therefore I shall accept his opinions," and I think that it was open to the learned judge to find as he has done. But, as I have said, my doubt has been whether he may not have somewhat confused his mind by the distinction that he draws between the two kinds of insanity, although in that passage his finding seems to be independent of any such distinction. I have my doubts about it, but, as the other members of the Court do not feel the same doubts, I do not dissent from their judgment that this appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. That suicide may be the result of what, in the statute, is called "personal injury by accident" I have no doubt; but in order to make out that it is the result it must first be proved that the suicide is the result or the effect of insanity and that the insanity is the result of the injury. If the second of those two questions is answered in the negative the first of the two questions really never arises. The learned judge in the present case has answered the second of the two questions in the negative in the passage which has been read.

Now, as I understand it, what the learned judge means by that is that on the medical evidence all he could find was that the insanity (whether in the legal or in the moral sense is immaterial for this purpose) was the result of the depression caused by the fact of the accident and the enforced idleness consequent upon it and the man's brooding over the fact of the accident—not that it was caused in any material sense by the injury which the man had received. If that is true, that is, in my opinion, in accordance with the views expressed in the Scotch Court of Session, which I will refer to presently, which views commend themselves to me. If we were to hold that insanity

is the result of the injury by accident where it is only indirectly the result—that is to say, where it is not occasioned by the injury itself, but by the consequences of the injury—I think we should be opening a door much wider than I, for one, should be prepared to.

I think I ought to justify the view I have expressed by referring to, first, one passage in the judgment of the Lord President and a passage or two in the judgment of Lord M'Laren in the case of *Malone* v. *Cayzer, Irvine & Co.* (1) That case came before the Court on what we should call in these Courts demurrer. The sheriff-substitute, having determined that, on the allegations made in the statement laid before the Court, there was no ground in law for those statements, had dismissed the application. The Court of Session sent it back to him in order to take the evidence and see what the real facts were. That was a case of suicide. To put it in other words, the Court decided that it was possible that suicide might be the result of the injury. The Lord President says this: "It may be a somewhat uphill matter for the claimant to prove her case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury." Then come these words: "I have some doubts as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach such a conclusion." I think, by his reference there to the state of knowledge of cerebral pathology, he obviously points to this: that, in his view, if insanity is to be treated as the result of the accident, it must be as the direct result, the accident or the injury having occasioned some pathological effect upon the brain, and not what Lord M'Laren calls a moral result or a moral effect arising from the consequences of the accident. Now Lord M'Laren takes the same view, but he puts his view with greater clearness, I think, if I may say so with respect, than the Lord President himself. What he says is this (2): "I cannot gather from the sheriff-substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness. There is no averment of insanity in the physiological sense of a result of disease of the brain, but merely that a man has committed suicide, and is

(1) 1 B. W. C. C. 27, 31, 32. (2) 1 B. W. C. C. 32.

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supposed to have done so under some insane impulse. It seems to me that in construing the Act of Parliament, and particularly the beginning of the First Schedule, we must hold that when the Act prescribes as a condition of compensation that death results from the injury, what is within the contemplation of the statute is a material injury with death materially resulting from it." That, I think, expresses the same opinion as that which I have ventured to express, that, in order that the insanity may be treated as the result of the injury, you must find that as a physiological result, not as an indirect result from the man's brooding over the fact of the injury, or from the depression occasioned in the case of a busy man restrained by the effect of the injury from going to work.

I think, therefore, that not only was there sufficient evidence to support the finding of the learned county court judge with reference to what I have called the second of the two questions, namely, whether the insanity was the result of the injury, but that I should have arrived, on the evidence, at the same conclusion myself.

Then, if the learned judge was right on that point, the first question, whether the suicide was the result of the insanity, really never arises at all. It is only on that point that such confusion as there is in the judgment of the learned county court judge with reference to the distinction between legal insanity, or insanity in the legal sense such as would afford a defence to an indictment, and insanity or unsoundness of mind as it is regarded by the medical man, arises. It seems to me, therefore, that in reality, having regard to the view which the learned county court judge has taken, and the view which, with all respect, I take as to the answer to the second of the two questions, such difficulty as is occasioned by the apparent confusion between legal insanity and medical insanity really becomes of no importance, because it is only on the first of the two questions, whether the suicide results from the insanity, that the question what is the nature of the insanity can be material.

On the whole, therefore, I think the appeal ought to be dismissed.

*Appeal dismissed.*

Solicitors for appellants : *Swepstone, Stone & Co.*
Solicitor for respondents : *C. H. Brewer.*

H. C. R.

[IN THE COURT OF APPEAL.]

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*July* 21, 24, 25, 28.

## JAMES MORRISON & CO., LIMITED *v.* SHAW, SAVILL, AND ALBION COMPANY, LIMITED.

[1915 J. 958.]

*Ship—Bill of Lading—Deviation—"Intermediate port"—Exception of King's Enemies—Ship sunk by German Submarine—Loss of Cargo—Liability of Shipowner.*

The plaintiffs were indorsees and holders of two bills of lading under which wool was shipped at Napier, New Zealand, in the defendants' steamship for carriage to London. Each bill of lading had in the margin the words "Direct service between New Zealand and London." It stated that the steamship was "now lying in the port of Napier, N.Z., and bound for London," and, after giving the fullest liberty to proceed to and stay at any ports or places in New Zealand for any purpose without any liability on the defendants on the ground of deviation, it continued: "and bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London, and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and/or Monte Video and/or La Plata for the purpose of taking on board coal, supplies and/or cargo and/or live stock," the goods to be delivered subject to all the above liberties to deviate and to the exceptions and conditions therein contained at the Port of London. The bills of lading contained an exception of the King's enemies. After the plaintiffs' goods were loaded on board and the bills of lading handed over a parcel of frozen meat was loaded on board for France, and the master received orders on the voyage to deliver the meat at Havre before going to London. When the steamship was about eight miles from Havre she was torpedoed by a German submarine, and she sank with her cargo. The usual and well-known course of the voyage of the defendants' line of steamships from New Zealand to London was by Cape Horn, calling at one of the three named South American ports, thence to Teneriffe or Madeira, and thence direct to London. The distance via Havre to London was fifty-four miles longer than the direct route to London, and the distance from Havre to the nearest point on the direct route to London was sixty-eight miles. No steamship of the defendants' line had ever before called at Havre. There was, however, at the time in question no greater likelihood of danger from submarine attack in going to Havre than in going to London direct. In an action by the plaintiffs to recover the value of the wool:—

*Held*, (1.) that Havre was not an "intermediate port" within the meaning of the bills of lading at which the steamship had liberty

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to call, that in proceeding thereto there had been a wrongful deviation from the named voyage, and that therefore the defendants could not rely upon the exception of the King's enemies in the bills of lading; (2.) that, as the defendants in deviating were breaking their contract as carriers, they could not rely upon the implied common law exception of the King's enemies, and that they were liable, not having shown that the loss must have occurred even if they had not deviated.

*Davis* v. *Garrett* (1830) 6 Bing. 716 and *Lilley* v. *Doubleday* (1881) 7 Q. B. D. 510 approved.

Judgment of Bailhache J. [1916] 1 K. B. 747 affirmed.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury: reported [1916] 1 K. B. 747.

The action was brought to recover the sum of 4013*l.* 19*s.* 7*d.*, the agreed value of 158 bales of wool shipped at Napier, New Zealand, in the defendants' steamship *Tokomaru* for carriage to London under two bills of lading, of which the plaintiffs were the indorsees and holders. Both bills of lading were dated November 19, 1914, and were in the same form. In the margin were the words "Direct service between New Zealand and London." They were headed "Steam from New Zealand to London," and stated as follows: "Shipped in good order and condition by . . . . on board the steamship *Tokomaru* . . . . now lying in the port of Napier, N.Z., and bound for London, with liberty to proceed to and stay at any port or ports, place or places in New Zealand, in any order or rotation, backwards and/or forwards, and notwithstanding that such ports or places are out of or away from the customary or geographical route to the port of discharge hereinafter mentioned, for the purpose of receiving and/or discharging goods, coals, supplies, or passengers, or for any other purpose whatsoever whether ejusdem generis or not, and to return once or oftener to any port or ports, place or places in New Zealand without any liability whatsoever resting on the shipowners on the ground of deviation by reason of any route taken as above, and bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London, and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and/or Monte Video and/or La Plata for the purpose of

taking on board coal, supplies and/or cargo and/or live stock, and to sail with or without pilots, and to tow and assist vessels in all situations, the following goods" (describing them) "to be delivered subject to all the above liberties to deviate and to the exceptions and conditions at foot hereof, in like good order and condition, at the Port of London," freight being payable at a certain rate. Clause 1 of the exceptions and conditions excepted the act of God and the King's enemies. Clause 3 was as follows: "The owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves or to other persons, proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat and re-ship and forward the same at the owner's expense but at merchant's risk."

The *Tokomaru* was a cargo vessel, and the usual and well-known route for steamers of this line on the voyage from New Zealand to London, which was always substantially followed, was by Cape Horn to Monte Video, or one of the other two named ports, thence to Teneriffe or Madeira, and thence direct to London; the mail steamers only calling at Plymouth to land mails and passengers. After the plaintiffs' goods had been shipped and the bills of lading handed over the defendants took on board a parcel of frozen meat for carriage to France. Havre was ultimately arranged as the port of discharge for the meat, and the master received instructions at Teneriffe, where the *Tokomaru* called, to proceed to Havre to deliver the meat. The *Tokomaru* accordingly proceeded to Havre, and on January 30, 1915, when she was about seven or eight miles from the port, she was torpedoed by a German submarine, and the cargo was totally lost.

The defendants, in answer to the plaintiffs' claim to recover the value of the bales of wool so lost, relied upon the exception of the King's enemies; and the plaintiffs contended that the defendants were not entitled to rely upon the exception as the *Tokomaru* was deviating from the direct voyage to London by proceeding to Havre. It appeared that the course from Teneriffe, whether to Havre or to London direct, was the same to a point about ten miles off the Casquets; that there the courses diverged; that from the point

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of divergence to Havre the distance was 107 miles, and from Havre to Dover 118 miles, and from the point of divergence to Dover direct 171 miles. Therefore by proceeding to Havre the length of the voyage was increased by fifty-four miles. From the point of divergence to Dover direct ships proceed on a course so as to make St. Catherine's Point, and from Havre to the nearest point of the ships' ordinary route to Dover the distance was sixty-eight miles. According to the evidence no steamer of this line had ever before called at Havre. Bailhache J. found that the master had received no warning that any danger was to be anticipated in calling at Havre, and there was no greater likelihood of danger in going there than in going to London. (1) A letter from the defendants to their agent in New Zealand—written on January 8, 1915, and stating that there was a distinct risk in deviating from the ordinary route without specific provision being made for it in the bill of lading—is set out in the judgment of Bailhache J.

Bailhache J. held that there had been a deviation not authorized by the bills of lading, and that the defendants could not rely upon the exception of the King's enemies; and he gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

*Sir Maurice Hill, K.C.*, and *Raeburn*, for the defendants. The *Tokomaru* in proceeding to Havre was not deviating from the agreed voyage. The bill of lading gave liberty "to call and stay at any intermediate port or ports." An "intermediate port" is not restricted, as Bailhache J. thought, to a usual and accustomed port of call. Where, as here, the usual and regular ports of call are well known to shippers of goods it is not necessary to give express liberty to call at those ports. The liberty to call at intermediate ports gives the right to call at ports other than the usual and regular ports of call. The port must be substantially on the course of the named voyage, the calling at which involves only a slight deviation from the course: *Leduc* v. *Ward* (2); *Glynn* v. *Margetson* (3); *White* v. *Granada Steamship Co.* (4) The port must be "in the

(1) [1916] 1 K. B. 754, 755.
(2) (1888) 20 Q. B. D. 475.
(3) [1892] 1 Q. B. 337; [1893] A. C. 351.
(4) (1896) 13 Times L. R. 1.

reasonable sense—in the business sense—on the way from the port at which the original cargo is taken under the contract with the shipper to the port at which it is to be discharged" : *The Dunbeth.* (1) Calling at a port must in all cases involve some deviation. The voyage from New Zealand to London is many thousand miles, and by calling at Havre the length of the voyage is only increased by fifty-four miles. That cannot be called a deviation. Havre is a port at which large liners call on the way to London, though the defendants' steamers do not.

In *Evans* v. *Cunard Steamship Co.* (2) it was held that in a voyage from Bari in the Adriatic to Liverpool calling at Constantinople was authorized by the deviation clause. That was a far greater deviation than that in the present case. The ports on either side of the English Channel ought to be regarded as substantially on the course of the voyage.

Next, if there was a deviation not authorized by the bills of lading, the defendants admittedly cannot claim the protection of any of the exceptions in the bills of lading, including that of the King's enemies. They became common carriers of the goods with the benefit of the common law exceptions of the act of God and the King's enemies. In *Internationale Guano en Superphosphaatwerken* v. *Macandrew & Co.* (3) Pickford J. considered that the effect of a deviation was to put the shipowner in the position of a common carrier. In *Balian* v. *Joly, Victoria & Co.* (4) and *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (5) this Court thought that, though the exceptions in the bill of lading were gone, there remained an obligation on the part of the cargo owner to pay freight and perform other stipulations which might be implied from the fact of the carriage of the cargo to its destination. The protection therefore to the shipowner implied from the fact that he is a common carrier remains. It may be, however, that the shipowners are not entitled, as Fletcher Moulton L.J. seemed to suggest in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (6), to be treated as being in so favourable a position. It may be that the shipowners in this case are not entitled to the protection of the common law exceptions inasmuch

(1) [1897] P. 133, 137.
(2) (1902) 18 Times L. R. 374.
(3) [1909] 2 K. B. 360.
(4) (1890) 6 Times L. R. 345.
(5) [1907] 1 K. B. 660.
(6) Ibid. 669.

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as they were breaking their contract, but in such a case the goods owner can only recover for a loss arising naturally, that is, according to the usual course of things, from the breach. It cannot be said that it was a natural consequence of the breach of contract by deviation that the vessel should have been torpedoed. The loss might equally, in all probability, have happened if the vessel had continued on her direct course to London. As Bailhache J. stated (1), submarines had not been active before January 30, 1915, and there was no greater likelihood of danger in going to Havre than in going to London. In *Parker* v. *James* (2) the right to recover for the loss which occurred during the deviation was admitted, the only question being whether the premiums paid on policies of insurance on the goods could be recovered. It is not possible for the shipowner to prove that, if the vessel had not deviated, the loss must equally have happened, as seems to have been suggested by Tindal C.J. in *Davis* v. *Garrett*. (3) In *Lilley* v. *Doubleday* (4) the defendant undertook to warehouse the goods in a particular warehouse, but in fact warehoused them in a different one where they were destroyed by fire, and the defendant was held liable for the loss. That is a totally different case from the present. The defendants do not rely upon clause 3 of the exceptions and conditions in the bill of lading, as it may be too ambiguous to protect them.

*MacKinnon, K.C.*, and *R. A. Wright*, for the plaintiffs. There was in this case a wrongful deviation. General words giving power to deviate must be cut down so as to be fairly applicable to the voyage agreed upon; otherwise, as Lord Esher M.R. in *Leduc* v. *Ward* (5) and Bowen L.J. in *Margetson* v. *Glynn* (6) said, it would be impossible to insure the goods. Sect. 46 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), provides that where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation; and there is a deviation (*a*) where the course of the voyage is specifically designated by the policy and that course is departed from; or (*b*) where the course of the voyage is not specifically designated by

(1) [1916] 1 K. B. 754, 755.
(2) (1814) 4 Camp. 112.
(3) 6 Bing. 716, 724.
(4) 7 Q. B. D. 510.
(5) 20 Q. B. D. 481.
(6) [1892] 1 Q. B. 343.

the policy but the usual and customary course is departed from. As a general rule liberty in a policy to touch and stay at a port, though conceived in very extensive terms, only confers a power of visiting such ports as lie in the usual and direct course between the termini of the voyage insured: Arnould on Marine Insurance, 9th ed., s. 401, citing r. 6 in Sched. I. of the Marine Insurance Act, 1906. That applies equally to the voyage contemplated by a bill of lading. Under the bills of lading the ship was "bound on finally leaving New Zealand for London." That voyage was the main object of the contract. The ship must proceed without unnecessary deviation in the usual and customary course of the voyage: *Davis* v. *Garrett* (1); *Leduc* v. *Ward* (2); *Glynn* v. *Margetson* (3); Carver on Carriage by Sea, 4th ed., s. 286. *Evans* v. *Cunard Steamship Co.* (4) was a very special case, because the jury found that Constantinople was on the customary route from Bari to Liverpool. The "liberty to call at any intermediate port or ports" means those intermediate ports on the route at which the vessels of this particular line usually call, that is to say, Teneriffe or Madeira. The liberty to call at those two ports is derived from the clause giving liberty to call at any intermediate port. Specific provision was necessary to enable the vessel to call at Rio de Janeiro, Monte Video, or La Plata, inasmuch as calling there involves a large divergence from the route. This is apart from any question as to the necessity of calling at a port for the purpose of coaling, which it is unnecessary to consider in this case. Havre, therefore, was not a port at which the *Tokomaru* had liberty to call. Even assuming —which is not admitted—that a ship can call at a port whose front door, so to speak, is passed on the voyage, as for instance Dover, on the way from New Zealand to London, still Havre cannot be described as such a port. In *Glynn* v. *Margetson* (5) Lord Herschell L.C. may have meant to apply that test in saying that "in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given." If that test is applied Havre does not come within it. The

(1) 6 Bing. 725.
(2) 20 Q. B. D. 475.
(3) [1892] 1 Q. B. 337; [1893] A. C. 351.
(4) 18 Times L. R. 374.
(5) [1893] A. C. 356.

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onus of justifying the deviation lies on the defendants: *The Dunbeth* (1).

There having been a wrongful deviation, there is no authority for the proposition that the defendants as common carriers can claim the protection of the common law exceptions of the act of God and the King's enemies, or that, if they cannot claim that protection, the loss was not recoverable because it did not flow naturally from the breach of contract. Those points were open for argument in *Parker* v. *James* (2), but were never even suggested. In *Davis* v. *Garrett* (3) Tindal C.J. stated the true proposition, "that as a loss has actually happened whilst his (the wrongdoer's) wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done." That principle was again stated in *Lilley* v. *Doubleday*. (4) The defendants being wrongdoers cannot rely upon the common law exception of the King's enemies, and they have not shown that the ship must have been torpedoed if she had not deviated. [*Garnett* v. *Willan* (5) and *Sleat* v. *Fagg* (6) were also referred to.] Moreover, inasmuch as the bill of lading contains the express exception of the King's enemies, no question of any implied exception of the King's enemies can arise: see Carver on Carriage by Sea, 4th ed., s. 74. The protection of the exception of the King's enemies having gone, it is impossible to say that that protection still remains.

*Raeburn* in reply. In the cases cited the deviation took the ship further away from her port of destination. In the present case the ship when proceeding to Havre was continually getting nearer London, and the distance out of the direct course was very slight. It cannot be called a deviation. The onus of proving deviation lies on the plaintiffs: Scrutton on Charterparties, 7th ed., art. 91; and they have not proved it.

*Cur. adv. vult.*

(1) [1897] P. 136.
(2) 4 Camp. 112.
(3) 6 Bing. 724.
(4) 7 Q. B. D. 510.
(5) (1821) 5 B. & Al. 53.
(6) (1822) 5 B. & Al. 342.

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July 28. SWINFEN EADY L.J. read the following judgment:— The plaintiffs are holders for value of two bills of lading for a quantity of wool shipped at Napier, New Zealand, for London by the defendants' steamship *Tokomaru*. This ship was torpedoed on January 30, 1915, by a German submarine when between seven and eight miles from Havre, and ship and cargo were an actual total loss. The plaintiffs sue for breach of the contract evidenced by the bill of lading. The defendants, while admitting the total loss of the goods, dispute their liability. They say that the loss occurred by an excepted peril, the King's enemies. The plaintiffs contend that the defendants are not entitled to rely upon the exception contained in the bill of lading, as they say the *Tokomaru* was deviating from the contract voyage by leaving the direct course for London and proceeding to Havre when the disaster occurred, and that the liberties contained in the bill of lading did not permit that to be done. This raises the first question, namely, whether the *Tokomaru* was deviating in proceeding towards Havre. If not deviating, there is an end of the matter, and the shipowners are protected from liability by the bill of lading. If, however, the *Tokomaru* was deviating, the further question arises as to the liability of the defendants as carriers under the circumstances. The defendants contend that they incurred no greater liability than that of common carriers, and are therefore not liable for acts of the King's enemies.

The bills of lading are dated in November, 1914, and are in the following form: [The Lord Justice read the words in the margin of the bills of lading, "Direct service between New Zealand and London," and the clause set out above.] Clause 3 was referred to, but seems to me to have no bearing on the present dispute. There was not any transhipment.

The ordinary route for steamers of this line is, outward bound, via Cape of Good Hope to New Zealand; homeward bound, from New Zealand via Cape Horn and west of the Falkland Islands to Monte Video, then to Teneriffe or Madeira, and thence direct to London.

Owing to certain instructions given by reason of the war the *Tokomaru* on her last voyage passed east of the Falkland Islands, and when off Pernambuco passed considerably to the east of her ordinary course. But nothing turns in this case upon any such

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variation, upon Admiralty instructions given by reason of the war. This ship was a cargo boat. Passenger ships of the same line going to and from New Zealand frequently call at Plymouth, but not so cargo boats. So far as appears from the evidence, this was the first time that a vessel of this line coming from New Zealand and bound for London had been instructed to call at Havre. The intended call was brought about in this way. A special arrangement was made to carry some frozen meat to France. At one time it was contemplated calling at Bordeaux to discharge this cargo, and in some of the bills of lading for part cargo of this ship liberty to call at Bordeaux was inserted, but on reaching Teneriffe the captain was instructed by the owners to proceed to Havre and discharge the meat cargo there. On leaving Teneriffe the course, whether for Havre or to London direct, is the same to a point about ten miles off the Casquets. There the routes diverge. From the point of divergence it is 107 miles to Havre and 118 miles Havre to Dover. Thus from the point of divergence to Dover via Havre it is 225 miles; from the point of divergence to Dover direct it is 171 miles; so by proceeding to Havre the length of the voyage would be increased by fifty-four miles. From Havre to the nearest point of the ship's ordinary route to Dover is a distance of sixty-eight miles. The direct service between New Zealand and London by the Shaw, Savill, and Albion Line has been long established and is well known, and the boats always follow substantially the same route outwards or homewards, as the case may be.

The first question is, Can it be said that the ship had liberty to go to Havre to discharge cargo by reason of the "liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies." It must be borne in mind when considering the true construction and effect of bills of lading that it is important to every one concerned in the carriage of goods by sea—whether shipper, shipowner, or insurer—that the route by which the ship and goods are to pass should be determined, that the risks may be estimated on that basis. Lord Esher said in *Leduc* v. *Ward* (1): "It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should

(1) 20 Q. B. D. 481.

be determined," and he had referred just previously to the difficulty of insuring the goods if it was not known for what voyage they were to be insured. Bowen L.J. in *Margetson* v. *Glynn* (1) and Cozens-Hardy L.J. in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (2) regarded the matter from the same point of view.

Again, where parties have agreed upon a voyage, and have specified that voyage in the bill of lading, the definition of the voyage must, as a matter of business, cut down the general words of the bill of lading to what is fairly applicable to the voyage which has been agreed upon and defined. Any other construction would make business impossible: *Margetson* v. *Glynn*. (1) In the same case in the House of Lords Lord Herschell referred to the necessity of construing a bill of lading from a business point of view and in limiting general words by the main object and intent of the contract. He said (3): "The ports a visit to which would be justified under this contract would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that I am, of course, speaking in a business sense. It may be said that no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants), inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given." In the bill of lading in question in this action there is given a very wide liberty to proceed backwards and forwards to ports and places in New Zealand, and notwithstanding that such ports or places are out of or away from the customary or geographical route to the port of discharge. This gives the shipowners wide facilities for taking in cargo in New Zealand, but after having done so the ship is "bound (subject to the before-mentioned liberties) on finally leaving New Zealand for

(1) [1892] 1 Q. B. 343. (2) [1907] 1 K. B. 669.
(3) [1893] A. C. 355.

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London." This is the main object of the voyage. It is a voyage from New Zealand to London. Then follows the liberty "on the way to London" to call and stay at any intermediate port or ports, and then with permission to call at three named places in South America, but for a limited purpose only—taking on board coal, supplies, and/or cargo, and/or live stock. There is no liberty to call there for discharging cargo. The ships of this line habitually avail themselves of the liberty "on the way to London" to call at any intermediate port or ports by calling at Teneriffe or Madeira, where they coal. That port lies on the route which they habitually take "on the way to London." But can it be said that Havre is an intermediate port in any proper sense of the term, as used in the bill of lading? It is distant sixty-eight miles from the nearest point of the route to London, and in order to reach it involves the vessel going off her course in one direction 107 miles. It is not shown to be a usual or customary port for vessels of this size and class coming from New Zealand to enter. In this particular case it was only for a special purpose, and by reason of a special bargain made after the plaintiffs' goods were shipped, that the captain was instructed to go to Havre. If the question be put, as in *Leduc* v. *Ward* (1), Is Havre substantially a port which will be passed on the named voyage, New Zealand to London? the answer must be in the negative. If the question be put, Is Havre a port which would naturally and usually be a port of call on the named voyage? the answer must be certainly not. If the question suggested by Lord Esher's judgment in *Margetson* v. *Glynn* (2) be put, Is Havre a port in the course of the voyage, in the sense that it may be reached by the ship going slightly out of her course? the answer must again be in the negative. By slightly out of her course is meant does the ship on her course go fairly close to the port, and in order to enter the port, or call off it, would she only have to go a very short distance out of her course? Whether you take the distance in the present case as 107 miles or as sixty-eight miles only, the departure from the course of the voyage is quite substantial, and not slight.

Again, the liberty is to call and stay at any intermediate port or ports, and if this liberty extends to Havre it seems to follow that almost any port in the English Channel available for a steamer

(1) 20 Q. B. D. 482. (2) [1892] 1 Q. B. 340.

of this size and draught, and on either the French or English coast, would be within the liberty, which certainly cannot have been intended or contemplated by the parties. The defendants take advantage of the liberty by calling at Teneriffe or Madeira, which are intermediate ports, but in my judgment Havre is not such port within the meaning of this bill of lading. The defendants' letter to Mr. Findlay dated January 8, 1915, shows that they themselves correctly appreciated the risk they would run in departing from their accustomed route. (1)

I am of opinion that it is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an intermediate port within the meaning of a bill of lading. In construing the document all the surrounding circumstances must be taken into consideration. The size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the port in question. It is a question of fact in each case, and in my judgment Bailhache J. was right in deciding that Havre was not an intermediate port on the voyage of this vessel from New Zealand to London, and that the *Tokomaru* in making for that port was deviating from her voyage, and that the defendants thereby lost the benefit of the exceptions in the bill of lading: *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (2); *Internationale Guano en Superphosphaatwerken* v. *Macandrew & Co.* (3)

If that be so, the remaining question is whether the defendants are protected from liability as carriers by the fact that the loss occurred through the King's enemies. If they, as carriers, were duly performing their contract of carriage, they would not be liable for loss occasioned by the King's enemies. But they are breaking their contract. They are quite unable to show that the loss must have occurred in any event, and whether they had deviated or not. True it is that there had been no previous warning of danger from submarines, and that the event which occasioned the loss was wholly unexpected, but this does not assist the defendants. The answer to the argument of the defendants on this point is that

(1) This letter is set out in the judgment of Bailhache J. [1916] 1 K. B. 753.

(2) [1907] 1 K. B. 660.

(3) [1909] 2 K. B. 360, 365.

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given by Tindal C.J. in *Davis* v. *Garrett* (1): "But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could shew, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done; but there is no evidence to that extent in the present case." In *Parker* v. *James* (2) the loss occurred from capture by the King's enemies while the vessel was deviating, and Lord Ellenborough held that the plaintiffs were entitled to recover the value of their goods on board the ship at the time she was captured by reason of the deviation. *Sleat* v. *Fagg* (3) and *Lilley* v. *Doubleday* (4) are also authorities against the defendants' contention.

In my judgment the appeal fails and should be dismissed.

PHILLIMORE L.J. read the following judgment:—The plaintiff company, owner of two parcels of goods shipped on board the *Tokomaru*, a vessel belonging to the defendant company, complains of the loss of these goods, which were sunk with the ship when she, being on a course for Havre and not far from that port, was torpedoed by a German submarine. The plaintiff company complains that it had shipped the goods for a voyage from New Zealand to London, and that the ship was deviating from her course and on a deviated course when she was lost.

This makes it necessary to determine, first, what was the course of the voyage; and, secondly, if there was a departure from that course, whether it was justified by the liberties given by the bill of lading. The material parts of the bill of lading are as follows: It states that certain bales of wool are shipped in good order and condition at the port of Napier. Then follow wide liberties as to trading in New Zealand. Then the ship is described as "bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London, and with liberty on the way to London to

(1) 6 Bing. 724.
(2) 4 Camp. 112.
(3) 5 B. & Al. 342.
(4) 7 Q. B. D. 510.

call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and/or Monte Video and/or La Plata for the purpose of taking on board coal, supplies and/or cargo and/or live stock," the goods to be delivered subject to all the above liberties to deviate and to the exceptions and conditions at foot thereof in like good order and condition at the Port of London. I do not think it necessary to dwell upon exception 3, though it was relied on by the shipowners.

The course adopted by the ships of this line (not being mail boats) is to come round the Horn, then put into one of the three named ports on the east coast of South America, then make a call at one of the coaling ports in the Atlantic islands, generally Teneriffe, and thence proceed straight to London. This is the usual course, and (except in respect of the South American ports) needs, I think, no use of any of the liberties or permissions to justify it. It was suggested that the call at the coaling port could only be justified under the liberty to call at intermediate ports. I do not think so. This call is one of the incidents of the voyage and is no departure. There are many similar instances, such as calling at weather stations to inquire about ice, or going to some station for a Government pass through territorial waters, or to pick up a pilot, or calling at a preliminary port to lighten the ship in order that she may finish the voyage with a less draught. These are not, in my view, departures from the usual and customary course of the voyage.

It is possible to carry the rule as to acceptance of that which is customary even further. It may be, if it is customary for the line, to which the ship belongs, to the knowledge of the shipper to touch at some intermediate port, not mentioned in the bill of lading, that touching at this port may be regarded as part of the customary course of navigation. For instance, it is possible that the practice of the mail boats of this line to call at Plymouth might be justified even without having recourse to the liberty to call at intermediate ports. The case of *Evans* v. *Cunard Steamship Co.* (1) seems to support this. I only mention this suggestion to show that I have not forgotten it, but I do not want to pronounce any opinion upon it.

(1) 18 Times L. R. 374.

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I now come to the liberty clause. Bailhache J. seems to give no effect to this liberty, or only to give it effect as enforcing the proposition that such departures from the direct geographical route as are incidental to the navigation may be made—that is, to justify that which I think needs no justification. In this I cannot agree with him. Lord Esher in *Leduc* v. *Ward* (1) and Lord Herschell in *Glynn* v. *Margetson* (2) treat the clause as having a meaning and one to which effect must be given. I will quote the passages. Lord Esher in *Leduc v. Ward* (1) says: "Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named." In *Glynn* v. *Margetson* (2) Lord Herschell said: "There is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage. That port or those ports would differ according to what the stipulated voyage was, inasmuch as at the time when this document was framed the parties who framed it did not know what the particular voyage would be, and intended it to be equally used whatever that voyage is. The ports a visit to which would be justified under this contract would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that I am, of course, speaking in a business sense. It may be said that

(1) 20 Q. B. D. 482. (2) [1893] A. C. 355.

no port is directly in the course of the voyage (indeed that was argued by the learned counsel for the appellants), inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true ; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given." On the other hand, the words, however large, do not warrant more than a limited extent of departure. This is well settled. None, however, of the cases cited come close to this one. They are all cases where either the ship went back on her track or made an enormous change of voyage, bringing her when at the so-called intermediate port no nearer her port of destination than she had been at the beginning of her deviation. Some guide, I think, can be got from the limited permission to use the three named ports in South America. This is evidence that the parties did not contemplate an unspecified departure from the course which would be as great as that involved in touching at these ports. But the alteration of course necessary for going to Havre is less than the alteration for the nearest of those named ports. It is very difficult to draw the line, and the question is largely one of degree, but, on the whole, I think that the degree has been exceeded in this case. And there is another ground which seems to me a safer one for affirming this decision. Lord Esher indicates—and I think rightly indicates—that there is a necessary condition which must be present to make a port an intermediate port. It must be one which "would naturally and usually be a port of call on the voyage." (1) By this he does not mean so much as "customary." What he means is that as a matter of commerce and business ships are frequently sent upon an adventure which includes touching at these intermediate ports. If, for instance, it was common for vessels despatched to Rouen to call at Havre, or despatched to Malaga to call at Cadiz, to this extent Havre and Cadiz would be intermediate ports. Now, as Bailhache J. points out, no evidence was given to show that it was usual for New Zealand vessels, or, I may add, vessels from South America, bound

(1) 20 Q. B. D. 482.

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for London to call at Havre. It is indeed true that the *Ikaria* (1) was bound from the South American coast to London via Havre, but this one instance is not enough. It is not, as far as we are informed, a known or usual voyage for vessels bound from New Zealand, or even from South America, to call at Havre on the way to London. I may add that the burden is on the shipowner to bring himself within the liberty.

As to the second point in the case, I can deal with it shortly. The cases of *Davis* v. *Garrett* (2) and *Lilley* v. *Doubleday* (3) lay down the true principle. As the accident occurred at the time and place when it did, the ship being then on her deviating course, the shipowner is responsible unless he can show that the loss or damage would have occurred if she had been on her proper course for London. There are circumstances in which conceivably this could be proved, but it could not be and was not proved in this case. Therefore the judgment is right and must be affirmed.

BANKES L.J. read the following judgment :—It is well settled that where in a printed form of charterparty or bill of lading general words are found giving liberty to deviate those words must be construed in reference to the main intent and object of the contract. In *Glynn* v. *Margetson* (4), both in the Court of Appeal and in the House of Lords, and in *Leduc* v. *Ward* (5) some rules will be found indicating some necessary limitations upon such general words. In the last of these cases Lord Esher (6) speaks of the liberty as extending only to putting into a port which is substantially on the course of the voyage. In *Glynn* v. *Margetson* in the House of Lords (7) Lord Herschell restricts the liberty to a port which is in a business sense on the way to the port of destination. In the same case in the Court of Appeal (8) Lord Esher speaks of what is permissible as a going slightly out of the sea course which the ship would take on the way to her destination. In the absence of any special considerations

(1) The *Ikaria* was one of the three ships sunk off Havre by a German submarine on or about January 30, 1915, to which reference is made in the judgment of Bailhache J. [1916] 1 K. B. 754.

(2) 6 Bing. 716.

(3) 7 Q. B. D. 510.

(4) [1892] 1 Q. B. 337; [1893] A. C. 351.

(5) 20 Q. B. D. 475.

(6) Ibid. 482.

(7) [1893] A. C. 356.

(8) [1892] 1 Q. B. 340.

arising out of the terms or the subject-matter of any particular contract the question of what is or is not permissible under a general liberty to deviate must resolve itself largely into a question of fact, in which the geographical position of the port visited in relation to that of the port of destination and the additional distance to be covered as the result of departing from the direct or customary course will be material, but not necessarily the only material, matters for consideration.

There may, however, be cases where as a matter of construction of the contract it may be necessary to give a much wider limitation to the general words than those indicated above in order to give effect to the manifest object and intention of the contract: see per Lord Herschell in *Glynn* v. *Margetson*. (1) This, as I understand his decision, is the principle upon which Bailhache J. has acted in the present case. The bill of lading describes the service provided by the defendants' fleet of steamers as a "Direct service between New Zealand and London." It describes the course to be taken by the steamers as "the customary or geographical route to the port of discharge." It confines the liberty to call to "intermediate ports on the way to London." Bailhache J. treats the subject-matter of the agreement between the parties as a contract to carry wool from New Zealand to London by one of this regular line of steamers trading between London and New Zealand ports, and having a recognized route and recognized ports of call both out and home. To such ports the liberty to call will naturally apply; but it seems obvious that in such a contract some limitation must be placed upon the number of other ports at which it is permissible to call, even though they may come within the description of being "intermediate ports on the way" to London; otherwise, from a business point of view, the manifest object and intention of shipping goods by such a line of steamers as that in question would appear to be defeated. If some limitation is to be placed upon the number, then where is the line to be drawn? It must be a question of degree. The circumstances may be such that, from a business point of view, any exercise of the liberty, even to a single port outside the recognized ports of call, must, except in cases of emergency, be considered as beyond the contemplation of the parties and therefore as defeating the object and

(1) [1893] A. C. 355.

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intention of the contract. That, I take it, is the view adopted by Bailhache J., who had evidence before him as to the regular route and ports of call of this line of steamers, and who had also the evidence of the owners as contained in their letter in reference to the course of business as between themselves and shippers by their line of steamers. This view is strengthened and confirmed by the special liberty inserted in the bill of lading to call at Rio de Janeiro, Monte Video, or La Plata for limited purposes only, a provision which would not have been necessary had the intention been to give full effect to the general words. The owners in their letter to which I have already referred emphasize this point when they ask that in future liberty shall be inserted in the bill of lading to call at French ports. In my opinion Bailhache J. took a view which was quite justified by the evidence before him, and I am certainly not prepared to differ from him upon it.

With regard to the appellants' second point that they can only be made responsible for such results of the deviation as could have been reasonably anticipated, I can see no ground derived either from principle or from authority in support of it. On the contrary I think that the authorities to which reference has been already made are distinctly against it.

I agree that the appeal fails.

*Appeal dismissed.*

Solicitors for plaintiffs : *Parker, Garrett & Co.*

Solicitors for defendants : *Ince, Colt, Ince & Roscoe.*

W. F. B.

[IN THE COURT OF APPEAL.]

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*July* 17, 18, 29.

## LONGHURST *v.* JOHN STEWART & SON (1912), LIMITED. PORT OF LONDON AUTHORITY, THIRD PARTIES.

*Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Work on Ship lying in Dock—Transit from Ship to Shore—Accident in Dock on Way Home—No Right of Workman to be in Dock except by Virtue of his Contract of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A carpenter was employed on a barge lying in a dock, and at night, when his work was finished, started to walk along the quay to the gates of the dock, but fell off the quay and was drowned. The dock was private property, and his employers had leave from the dock owners to authorize their workmen to use this means of access. The public had no right to enter the docks:—

*Held*, that, inasmuch as the workman had no right to be upon the dock premises except by virtue of his employment, the accident did arise out of and in the course of the employment.

APPEAL from an award of the judge of the Bow County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of Pickford L.J.:—

In this case the applicant is the widow of a man of the name of Longhurst, who was drowned in South-West India Dock Basin in the following circumstances. The respondents had a contract for some work upon a barge called the *Forward*, which was lying in the basin, and Longhurst, who was a carpenter in their employment, had on the day of his death been working on the barge. The men on the work were taken on at the respondents' office outside the dock, into which the only access is through the gates. The dock is the private property of the Port of London Authority, and there is a policeman at the gate, who is said sometimes to have stopped the men as they came in, presumably to find out if they had any business in the dock or permission to go there. In this case permission had been obtained for the respondents' men to go into the dock to do the work on the *Forward*. To get to the basin where the

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*Forward* lay the men passed over part of the dock premises, then crossed one of two bridges over lock gates, and so came to the barge, which was lying close to the inner gates. The men generally crossed by the middle gates, but they could cross by the inner if they chose. There was obviously considerable danger in going to and from the barge and the dock gates in the dark. On November 9, 1915, Longhurst was working on the barge. The time to finish work on that evening was 8 P.M. About 7.50 P.M. the men's numbers were taken for the purposes of overtime payment, and Longhurst must have left very soon after this and a few minutes before 8 P.M., but nothing turns on his leaving a few minutes earlier than the proper time. He got off the barge on to the quay close to the inner lock gates and in some way fell into the water and was drowned, and his body was found near those gates.

The learned county court judge found that this accident did not arise out of or in the course of his employment, because the relationship of employer and workman ceased when he left the barge, on which his employers had engaged him to do work, and passed on to the dock premises, over which they had no control, and that the dangers he encountered on the quay had no more bearing on the case than dangers encountered on the high road would have had. Against this decision the applicant appealed.

*Shakespeare*, for the appellant. The learned judge thought that the accident would have arisen out of and in the course of the employment if it had happened on the premises of the employers, but that it did not do so because it happened on the premises of other people. But the workman's contract of employment gave him a right to go into the docks, so he was in the same position as if they had belonged to his employers: *Gilbert* v. *Owners of Steam Trawler Nizam.* (1) His contract of service gave him the right to be at the place where the accident happened, although as a member of the general public he had no right to be there: *Cremins* v. *Guest, Keen & Nettlefolds* (2); *Walters* v. *Staveley Coal and Iron Co.* (3); *Walton* v. *Tredegar Iron and Coal Co.* (4); *Mole* v. *Wadworth.* (5)

(1) [1910] 2 K. B. 555, 558.
(2) [1908] 1 K. B. 469.
(3) (1910) 4 B. W. C. C. 89, 303.
(4) [1913] W. C. & Ins. Rep. 457.
(5) (1913) 6 B. W. C. C. 129.

He might reasonably be there at that time: *Moore* v. *Manchester Liners* (1); *Webber* v. *Wansborough Paper Co.* (2) This workman was using the means of exit provided by the employers under the contract of service; he was not acting as a member of the public.

*Hollis Walker, K.C.*, and *H. Duckworth*, for the respondents. The judge was right in law and in fact. The workman had finished his work and his employment was at an end. The accident therefore did not take place in the course of the employment: *Cook* v. *Owners of S.S. Montreal.* (3) The liability ceased when he arrived on the quay: *Kitchenham* v. *Owners of S.S. Johannesburg.* (4) The quay was in the same position as a public street. The employers did not owe any duty to the deceased when he was on the quay: *Holness* v. *Mackay and Davis.* (5)

*Shakespeare* in reply.

*Cur. adv. vult.*

July 29. LORD COZENS-HARDY M.R. The facts as found by the county court judge are as follows: [His Lordship stated them.]

I think two propositions are established by the authorities: (*a*) The employment of a workman does not begin until he has left a public road, and it does not end until he has reached a public road. While on the road he is exercising his right as a member of the public, and not any right arising out of his contract of employment. (*b*) When the workman is on the employers' land he would be a trespasser but for the contract of employment, and he is within the protection of the Act although the accident may happen when he is not actually at work, but is only going to or returning from his work: see *Gane* v. *Norton Hill Colliery Co.* (6), and especially the judgment of Farwell L.J.

The present case is not precisely within the terms of the second proposition, because the docks were not the property of the employers, but in principle I think the proposition covers the present case. Longhurst was rightfully in the dock, not as a member of the public, but solely by virtue of the contract of employment and of the permission granted through his employers to pass through the

(1) [1910] A. C. 498, 501.
(2) [1915] A. C. 51.
(3) [1913] W. C. & Ins. Rep. 206; 6 B. W. C. C. 220.
(4) [1911] 1 K. B. 523.
(5) [1899] 2 Q. B. 319.
(6) [1909] 2 K. B. 539, 544, 545.

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dock to the *Forward* and to return from the *Forward*. In my opinion the employment began when he entered the dock gates and continued until he left the gates and reached a public road. The accident therefore occurred in the course of his employment, and it cannot be doubted that it arose out of his employment.

The county court judge held that when Longhurst reached the quay the result was the same as "if he had got off the barge on to the high road." He thought this conclusion was warranted by *Cook* v. *Owners of S.S. Montreal* (1), where this Court held that a discharged seaman who had left his ship and reached a dolphin, but did not reach the quay itself, could not claim compensation. In that case it was assumed by everybody that the public had access to both the dolphin and the quay, which in truth was not distinguishable from the adjacent public road. Buckley L.J. in terms said the man had landed, that the dolphin was the land. That assumption may or may not have been correct, but the case cannot be regarded as an authority in the present case, where it is proved that the public had no right within the dock. This is the way in which Lord Haldane understood the case in *Webber* v. *Wansborough Paper Co.* (2), where he said "the dolphin was treated as being as much part of the land as the quay itself," and refers to the dolphin as a structure to which the public had access, and which no doubt they frequented and on which people might be for many purposes. In my opinion the decision of the county court judge cannot be supported and an award must be made in favour of the appellant.

PICKFORD L.J. stated the facts as set out above, and continued: The workman in this case in order to get to the actual place of work had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment. The public had no right to enter those premises by virtue of the general rights of the public, and were not exposed to the dangers which this workman by reason of his employment had to encounter. It seems to me on principle that any accident occurring to him on these premises to which he

(1) [1913] W. C. & Ins. Rep. 206; 6 B. W. C. C. 220.
(2) [1915] A. C. 51, 55.

was taken only by his employment, and on which he had no right to be but for his employment, was an accident arising out of his employment, and that the relationship of employer and workman did not cease till he left those premises and his position became again that of an ordinary member of the public.

But it was argued that we are prevented from so holding by authority, and the cases relied upon by the respondents were chiefly what were called the dock cases, and in particular *Cook* v. *Owners of S.S. Montreal* (1) and *Webber* v. *Wansborough Paper Co.* (2) I do not think that these cases do conclude this question. There was no evidence given in any of them that the workman had no right upon the dock premises except by virtue of his employment, and I think it was assumed in all of them that there was a public right of access to the docks, and that as soon as the workman left his ship and stepped upon the quay he was in exactly the same position as any other member of the public. This seems to me to appear from the judgment of Hamilton L.J. in *Cook* v. *Owners of S.S. Montreal* (3), and more clearly from the opinion of Lord Haldane in *Webber* v. *Wansborough Paper Co.* (4) commenting on and explaining that case. He says: "In that case the ship was moored to a dolphin connected with the quay by means of a permanent bridge. The dolphin was not railed and was badly lighted. The seaman got safely on to the dolphin, but fell between it and the quay and was drowned, and it was held that the accident did not arise in the course of his employment, the reason being that the dolphin was treated as being as much part of the land as the quay itself in that case. Obviously the dolphin was a large structure, in some respects in its arrangement not unlike the quay itself, and it is a very difficult thing to say of the dolphin to which the public had access, and which no doubt they frequented, and on which people might be for many purposes, that it was in the same position as a ladder that has been specifically appropriated by means of a plank as the access on the occasion to the quay." It may very well be that on examination the facts might have turned out in some at any rate of those cases to be similar to the facts here, and similar evidence might have been

(1) [1913] W. C. & Ins. Rep. 206; 6 B. W. C. C. 220.
(2) [1915] A. C. 51.
(3) [1913] W. C. & Ins. Rep. 206; 6 B. W. C. C. 225.
(4) [1915] A. C. 55.

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given, but the examination was not made and the evidence was not given, and the judgments seem to me to proceed on an assumption opposed to it.

I ought also to mention the case of *Holness* v. *Mackay and Davis* (1), where it was held, Romer L.J. dissenting, that an accident to a workman on a path alongside a railway, which his employers had obtained permission for him to use, did not arise out of his employment. I do not think that this case is covered by that decision; it was decided under the Act of 1897, which was more limited as to the place of the accident than the present one, and it was pointed out by A. L. Smith L.J. that the workman was not obliged to use the path. Moreover, if it is to be taken to decide that an accident cannot arise out of the employment unless it happens on the employer's premises, it is not consistent with later decisions or perhaps with the later statute.

I think, therefore, that there is no authority which prevents me from holding, as I think I ought on principle to hold, that this accident arose out of Longhurst's employment, and that the appeal should be allowed.

WARRINGTON L.J. On November 9, 1915, the workman in this case met with an accident which resulted in his death. The county court judge has held that the accident did not arise in the course of the man's employment, and on that ground has made an award in favour of the employers. The dependant appeals. The ground on which the learned judge has come to the above conclusion is that the employment ceased before the moment at which the accident happened. There is no dispute about the facts, and I think the conclusion of the learned judge is really an inference of law from undisputed facts and therefore open to appeal: see per Lord Atkinson in *Herbert* v. *Samuel Fox & Co.* (2)

The undisputed facts are these: [His Lordship stated them.] Was the county court judge right in holding that at the time the accident happened his employment had ceased? Had the accident happened while he was upon the employers' premises I think there can be no question that it would have been held to have happened in the course of his employment. The reasons for

(1) [1899] 2 Q. B. 319. (2) [1916] 1 A. C. 405.

this view are thus explained by Farwell L.J. in *Gane* v. *Norton Hill Colliery Co.* (1) Speaking of a collier he says: "He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and repassing for all legitimate purposes connected with his work on the premises. . . . . All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment." I think it is equally clear that if the quay had been a public place the employment would have ceased when he reached it, for his right to be there would have been derived not from his contract, but from his position as one of the public.

The question is, Should the fact of the workman having, under the circumstances of this case, reached the quay have the effect of terminating the employment? In my opinion the facts of this case bring it within the principle upon which such cases as *Gane* v. *Norton Hill Colliery Co.* (2) were decided, namely, that if at the time of the accident the workman is doing that which he was entitled to do by virtue of the employment, and which but for the employment he would have no right to do, then the employment is continuing and the accident arises in the course of it. *Cremins* v. *Guest, Keen & Nettlefolds* (3) is a case in which, though the accident did not happen on the employers' property, it was held to arise out of the employment because the workman was exercising a right under the contract.

In the present case it seems to me that the employment began as soon as the man passed the dock gates and did not cease until he left them; during the whole of this time he had certain rights, including that of passage to and fro, and was under certain instructions, e.g., to keep within the licence expressly or impliedly given by the Authority, which he would not have had and to which he could not have been subject if he had not been engaged in the particular employment.

Some difficulty is no doubt caused by *Cook* v. *Owners of S.S.*

(1) [1909] 2 K. B. 539, 545. (2) [1909] 2 K. B. 539.
(3) [1908] 1 K. B. 469.

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*Montreal* (1), but I think that case must have been decided on the ground that the quay and the dolphin were places to which the public had access; this was certainly the view of that case expressed by Lord Haldane in *Webber* v. *Wansborough Paper Co.* (2) At any rate it is proved in the present case, and was not proved in *Cook* v. *Owners of S.S. Montreal* (1), that it was only by virtue of his contract that the workman was on the quay, and this, I think, is a sufficient distinction. It was from the quay that he had the fatal fall, and I think the accident therefore happened in the course of his employment. If it did, then I think there can be no question that it arose out of the employment, and the appellant would be entitled to have the matter sent back to the county court judge to assess compensation.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitors for respondents: *W. Carpenter & Sons.*

(1) [1913] W. C. & Ins. Rep. 206; 6 B. W. C. C. 220.
(2) [1915] A. C. 51.

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[IN THE COURT OF APPEAL.]

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## HARPER *v.* HARPER.

*Employer and Workman—Compensation—Seaman—Injury by Accident —Notice of Claim—Release under the Merchant Shipping Act*, 1894 *—Exception from Release of Claim under Workmen's Compensation Act—Receipt by Workman of Payments from Managing Owner during Four Years—Subsequent Claim against Master—Failure to give Notice of Claim within Six Months of Occurrence of Accident— Reasonable Cause—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1.

A seaman met with an accident on board ship while at sea and was incapacitated thereby. On reaching port he signed the usual form of release under the Merchant Shipping Act, 1894, from all claims for wages or otherwise in respect of the voyage, but by a note on the back of the form he excepted therefrom any claim under the Workmen's Compensation Act, 1906 :—

*Held*, that this did not operate as a notice of claim under the Act.

The ship was worked on the "thirds" system, under which the master took two thirds of the gross profits, making certain payments and engaging the crew, while the owners took the remaining third. The master knew of the accident and told the workman, who was his brother, to apply to the managing owner, which he did, and for a period of four years from the accident he received from him weekly payments which were made ex gratia and without any acknowledgment of liability. The owner having ceased to make the payments, the workman commenced proceedings for compensation against the master :—

*Held*, that there was "reasonable cause" within s. 2, sub-s. 1 (*b*), of the Act for his failure to make a claim against the master within six months from the occurrence of the accident, and consequently that the proceedings were maintainable.

APPEAL from an award of the judge of the Gloucester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was a sailor employed on board the schooner *John Sims*. This ship was worked upon the "thirds" system, under which a third of the gross profits was taken by the owner, who found all gear and oil for the ship's lights and did all necessary repairs, the remaining two thirds going to the master, who paid all wages and harbour dues and found all victuals. The crew were engaged

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by the master, who controlled the ship and took what freights he chose. The managing owner in this case was one Alexander Johns, and the respondent Harper, the applicant's brother, was the master.

On February 23, 1911, while on a voyage, the applicant met with an accident, being knocked down by the boom and incapacitated. Two days later the ship went into port at Plymouth, from which place the respondent telegraphed to the owner, Johns, who came down from London, and he and the respondent took the applicant to a doctor, who found that he had sustained a rupture.

On March 3, 1911, the applicant signed off the ship's articles in accordance with s. 136 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). For this purpose he executed a release in the following form, known as Form M :—

"Release . . . . with note of excepted claims (if any). We the undersigned members of the crew . . . . do hereby release the said ship and the master and owner or owners thereof from all claims for wages or otherwise. . . . .

"Note.—Pursuant to s. 60 of the Merchant Shipping Act, 1906, there are excepted from this release the claims or demands which are specified on the back hereof and which are identified by the signatures of the respective seamen notifying such excepted claims or demands."

The applicant in signing this form, at the respondent's suggestion, excepted from the release any claim against the ship, master, and owners under the Workmen's Compensation Act, 1906, in respect of the accident.

On March 5 the applicant, at the respondent's suggestion, went to Gloucester to see Johns, who gave him 2*l.* and sent him to an infirmary, where he underwent an operation for hernia, and was discharged on April 12, 1911. While he was in the infirmary Johns sent 1*l.* to his house. After leaving the infirmary he went again to see Johns, who gave him 14*s.* He continued to attend at the infirmary as an out-patient, and received 14*s.* weekly from Johns.

In June, 1911, Alexander Johns died, and his son William Johns thereafter acted as managing owner of the ship.

On June 15 the applicant was discharged from the hospital with a certificate that he could do light work. This certificate he took to William Johns, who paid him 14*s.*, and he then signed a receipt

for all the payments to date as being in full settlement of all claims for injury received on February 23, 1911, on board the schooner. Shortly afterwards the applicant began to suffer from paraplegia and became totally incapacitated. He applied to William Johns for compensation, and Johns then communicated with the Sailing Ship Mutual Insurance Association, Limited, with whom the owners of the ship were insured against employers' liability. On January 24, 1912, the company wrote to him saying that they would allow the applicant 10*s.* a week as from December 1, 1911, until some time in the future, but that it must be understood that the payments would be gratuitous and were made without prejudice and without any admission of liability. The insurance company stopped the payments at the end of 1912, but Johns continued to make them till March 15, 1915, when they ceased altogether. The applicant then took advice, and on December 3, 1915, commenced these proceedings claiming compensation from the respondent under the Workmen's Compensation Act, 1906.

The county court judge dismissed the application on the ground that no notice of claim for compensation had been given to the respondent within six months of the date of the accident, and that the failure of the applicant to make a claim was not occasioned by mistake or other reasonable cause within the meaning of s. 2, sub-s. 1 (*b*), of the Act. The applicant appealed.

*Lort-Williams*, for the appellant. The exception inserted in the form of release signed by the applicant operated as notice of a claim. The form in which the claim is made is a pure technicality; any claim is sufficient: *Luckie* v. *Merry*. (1) Form M is addressed to the master of the ship as well as the owners. It is equivalent to a notice by the applicant that he has a claim which he excepts from the release. The mere signing of the form was in itself a sufficient notice of claim. But, even if the form be not in itself a sufficient claim, the conversations deposed to between the applicant and the master constituted the making of a claim. No definite demand is necessary in such a case as this. A claim need not be made in writing: *Lowe* v. *M. Myers & Sons*. (2) At any rate there was reasonable cause for the failure of this applicant to make a claim

(1) [1915] 3 K. B. 83. (2) [1906] 2 K. B. 265.

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against the respondent within six months of the accident. He was induced by the respondent to look to Johns and to receive money from him. While the applicant was in receipt of the payments from Johns it would not have been reasonable for him to make a claim against Harper. This is a stronger case than *Luckie* v. *Merry*. (1) *Rolls* v. *Pascall & Sons* (2) does not carry it much further; but see the observations of the Master of the Rolls in that case.

Lastly, it is submitted that the failure to make a claim against the respondent arose from mistake. The true position of the parties in regard to a ship worked on the " thirds " system is not at all clear. In some cases it has been held that the master is not the servant of the managing owner: *Boon* v. *Quance* (3); *Standing* v. *Eastwood & Co.* (4); while in *Kelly* v. *Owners of S.S. Miss Evans* (5) the crew were held to be the servants of the owners, the master being their agent for employing them. There is therefore a conflict of authority and the workman could not know who was the right person to proceed against. He was misled by the respondent into making the mistake.

*Lowry Porter*, for the respondent. [He was only called upon as to the question of mistake or other reasonable cause.] It is suggested that the making of a claim is a mere technicality; but it may be of the utmost importance: *Thompson* v. *R. W. Goold & Co.* (6) In the case of a seaman no notice of accident is necessary: Workmen's Compensation Act, 1906, s. 7, sub-s. 1 (*a*). That being so, the notice of claim is important. Here no doubt the respondent knew of the accident, but he did not know that any claim would be made against him. The payments made to the applicant were gratuitous and not by way of compensation. There was no reasonable cause for failing to give notice of claim in this case: *Egerton* v. *Moore* (7); *Meier* v. *Dublin Corporation*. (8) The position is different to that in *Luckie* v. *Merry* (1), where the workman was told to carry on by the employer, who continued to pay his wages. If there was any mistake it was a mistake of law which does not avail the applicant.

[WARRINGTON L.J. referred to *Moore* v. *Naval Colliery Co.* (9)]

*Lort-Williams* in reply.

(1) [1915] 3 K. B. 83.
(2) [1911] 1 K. B. 982, 986.
(3) (1909) 3 B. W. C. C. 106.
(4) [1912] W. C. & Ins. Rep. 200.
(5) [1913] 2 I. R. 385; W. C. & Ins. Rep. 418.
(6) [1910] A. C. 409.
(7) [1912] 2 K. B. 308.
(8) (1912) 6 B. W. C. C. 441.
(9) [1912] 1 K. B. 28.

LORD COZENS-HARDY M.R. This is an appeal from the award of the learned county court judge at Gloucester, who has dismissed the application of the workman against the employer in this way: "I find that there is no evidence that the applicant made a claim on the respondent for compensation in respect of such injuries within six months of the accident, as the Act required him to do, and that his failure to make a claim within the time limited by the Act was not occasioned by mistake or other reasonable cause." A great part of the argument of counsel for the appellant depended on Form M. It was contended that that was a notice of claim.

In order to understand the argument I must state one or two facts. The accident to the applicant happened on February 23, 1911. It was a serious accident. The vessel in which the man sailed was worked on what is called the "thirds" system. The master, who was entitled to two thirds of the gross profits, was the respondent Harper. The managing owner was a man named Johns. That being the state of things, when the crew were discharged a release in the following form was executed by the crew: "We the undersigned members of the crew of above named ship do hereby release the said ship and the master and owner or owners thereof from all claims for wages or otherwise in respect of the above named voyage. And I the master do hereby release the said undersigned members of the crew from all claims in respect of the said voyage." Then there is a note that there may be excepted from the release "claims or demands which are specified on the back hereof and which are identified by the signatures of the respective seamen notifying such excepted claims or demands." That was the form of the release signed by Harper the applicant; and although we have not got the actual document which he signed or its precise terms, this much is ascertained, that he did except from the release any claim under the Workmen's Compensation Act, 1906.

It is said that, there being a doubt whether a claim should be made against Johns or against Harper the master, this exception, which both Johns and Harper must be taken to have had notice of, was really a claim against whomsoever it might concern—a claim against Johns or Harper. I am quite unable to accept that view.

What is the effect of the release? The release has the effect that it would be a bar, a defence, to any action which the men who signed

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it might bring against the persons to whom the release was given. But the general words of that release apply to claims arising out of the contract. The effect of the exception is that if Harper chose to make a claim against anybody under the Workmen's Compensation Acts this release would not be a bar to any proceeding in respect of it. But to say that the exception from the release of claims under the Workmen's Compensation Acts is to be taken as itself a claim as against either Johns or Harper seems to me to be altogether without foundation. We must deal with the case on the basis that there was no notice of claim given to anybody within six months of the happening of the accident.

Then it is said that the failure to make a claim is excused by s. 2, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1906, which provides that "The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

I do not think there was any mistake here. It must be a mistake of fact and there was no mistake of fact. Was there "other reasonable cause" for not having made a claim? I do not think it possible, and if it were possible it is not desirable, that we should attempt to lay down any general canon of construction of these words, or to define beforehand every case in which they are to apply. But in the circumstances of this particular case I think there was a reasonable cause for not making a claim.

To continue with the facts. The accident happened in February, 1911, a long time ago. The respondent Harper had full notice of the accident, which in this case was not necessary, the accident having taken place on board ship. He told the applicant to go to Johns, and I have no reason to suppose that that was other than an honest statement by the respondent of what he believed was the right thing to do. Then the applicant went to Johns. Johns made certain payments to him, and with a few exceptions—so few that I do not think they are material—in one shape or another the applicant has been receiving a weekly sum in respect of compensation from Johns. During some portion of the period the payments were expressly made without acknowledgment of liability, as ex gratia

payments; but some of the payments were not so at all. Even in regard to those that were ex gratia there was a provision that, if compensation were recovered from the insurance society, Johns, who made the payments, should be repaid. Under these circumstances I think we are justified in saying, and ought to say, that the circumstances were such that there was reasonable cause why the applicant should abstain from giving written notice of claim against the respondent Harper, who was not treated as the person liable, by reason of the statement made by him to the applicant.

I do not desire to base my judgment on any other cases at all. I think, on the facts of this extremely complicated case, we are quite justified in saying that there was reasonable cause. That being so, all we can do is to reverse the finding of the learned judge and say that the failure to make a claim within the specified time ought not to be a bar. Then the matter must go back to the learned county court judge to find the facts. He must find whether the applicant's present state is due to the accident, and, if so, the amount of compensation.

PICKFORD L.J. I am of the same opinion. Two points are raised in this case, namely, whether a claim for compensation was made by the workman within six months after the accident, and, if not, whether the absence of any claim was occasioned by any reasonable cause. It has been decided that the notice of claim may be given in any way provided it is a definite intimation of a claim. In the case of *Luckie* v. *Merry* (1) we were dealing with a case where a notice of the accident was required as well as a notice of claim. I said in my judgment in that case—and I think the other members of the Court made statements to the same effect—that the giving of a notice of claim was a pure technicality and formality and would affect nobody. I quite agree with what was said by counsel for the respondent in this case, that that remark may not apply to the case of a seaman where no notice of accident is required. I do not think, however, that that distinction applies here, because the employer here knew all about the accident from the beginning. The notice of claim that is said to have been given here is Form M

(1) [1915] 3 K. B. 83.

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under the Merchant Shipping Act, 1894. This form is signed by a seaman on discharge from a vessel, and if he wishes to reserve any claim against the ship, master, or owners he notes such claim on the back of the form. [His Lordship read the material parts of the form and continued :]

The release has been held by this Court to refer only to claims arising out of the contract of service with the ship, and a claim under the Workmen's Compensation Act, 1906, for compensation does not come within it so as to make it necessary to except any such claims from the release. Still, if, under a misapprehension, the present respondent had put a claim on to the back of the form, I have no doubt that it would have been a sufficient notice. In my opinion, however, he did not do anything of the kind. The accident had taken place at sea, and the master, who was the applicant's brother, knew all about it and did all that he could for the applicant. At the end of the voyage, therefore, the master pointed out to his brother that he had better not discharge the ship without more, but in signing the form he had better reserve any claim he had. He therefore signed a release on the Form M, which is the common form. [His Lordship read it and continued :] That seems to me to constitute no claim against any one, but to be simply a statement by the man that he reserves any claim he may have in respect of the accident against the ship, master, or owner. He does not say that he has a claim against any of them. As a matter of fact, what the man did was to follow that up by making a claim against the managing owner, Johns. I cannot see how the reservation of a claim against three different persons and the making of a claim against one of them can amount to making a claim against one of the other two. Therefore there was no claim within the Act.

Then was there a reasonable cause for the man's not making a claim ? The circumstances are very peculiar, and I do not suppose they are ever likely to arise again. Therefore I hope this decision will never be cited as governing any other case. What happened here was that, after the crew were paid off, the man went ashore with his brother, and on landing his brother advised him to go and see Johns. He did as he was advised, and his evidence as to what happened is this : " Johns told me to go and see Dr. Bell. I went. I asked Johns ' What about my compensation ? ' He said that

would be all right, as they had me fully covered by insurance. Dr. Bell sent me to the infirmary. I went and saw Dr. Washbourn too; I had to undergo an operation. I went and told Johns. He said everything would be all right. I need not worry my head about it. On March 18 I went to the infirmary." Before he went to the infirmary Johns gave him 2*l*. After about a month he was given another 1*l*. After that Johns paid him 14*s*. a week for two months until June 15. For part of the time the payments were accepted as being ex gratia payments, but that was not for the whole time, I think. Later in June the man became much worse, and paraplegia came on, with the result that when he was talking to his brother he fell down and was unable to pick himself up. He was in fact becoming paralysed. According to the man's own account his brother then said "he would see Johns about it, as the doctor had no right to sign me off. He told me to go and see Johns. I went and saw Johns"—that is, William Johns. (Alexander Johns was then dead.) "I asked for compensation. He said 'I do not know whether you will get it or no, as you have signed off. I will write to London.'" After that no compensation was paid for some time, but payments were ultimately resumed and continued for a considerable time. They may have been made ex gratia. What is the result of those facts? The ship was sailed on the principle of "thirds," and difficult questions existed as to the relation of master and owner. Any mistake by the man in this connection would not assist him, as it would be a mistake of law; but it may be material to consider this in deciding whether the man acted reasonably in not making a claim against the master. He was told by the master to go to Johns, the managing owner, who to all appearances accepted liability and made payments to the man for some time, and when Johns died his son, who succeeded him in the business, continued to make payments. Would any reasonable man in such circumstances make a claim against the master, who had himself told the man to go to the managing owner? In my opinion there are circumstances which show that the man had reasonable cause for not making a claim against the master within six months; and that being so, he is entitled to maintain the present claim against him. The case must be remitted to the county court judge to deal with the matter and decide all the material questions.

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WARRINGTON L.J. I agree. In my opinion the county court judge was right in holding that the workman did not in fact make a claim for compensation within six months of the accident, and I do not wish to add anything to what has already been said on this point. But, in my opinion, the learned judge was wrong in not giving the applicant the benefit of s. 2, sub-s. 1 (*b*), of the Workmen's Compensation Act, 1906, by holding that the failure to make a claim within six months had been occasioned by reasonable cause.

The material facts in this case are these. The applicant was a seaman, and he met with an accident while on board ship at sea. The respondent is the master. Having regard to the particular nature of the arrangement under which the ship was sailed, it may be that the master was the man's employer, or it may be the owner was. That point is one which is open to question.

The result of the evidence is that, this being the state of things, the respondent himself, who was the master, told the applicant to go to the owner as the proper person to pay him compensation. The result of his doing so was that the accident having happened in February, 1911, he received payments till March, 1915. In March, 1911, while in the infirmary, he received money to go on with, and after he left he received from the owner or the owner's insurance company regular weekly payments till June, 1911. From June, 1911, to November, 1911, the man received nothing, but payments were resumed on December 1, 1911. They were made, no doubt, gratuitously and without admission of liability, but in some form or another the payments continued till March, 1915, when they ceased. The applicant in these circumstances brings this claim for compensation against the respondent, who is the master.

The circumstances are certainly peculiar, but it comes to this, that the man was induced by the respondent against whom he is now claiming to make his claim against the wrong person, and that, having made it, it succeeded to the extent of his receiving payments extending over four years.

I think that in these circumstances there are a number of reasonable persons who would never have dreamed of making a claim against the man who had himself brought about a successful claim against some one else. I hold, therefore, that the failure to make a claim against the respondent was due to reasonable cause, and

that the case must go back to the county court judge to be heard out.

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This case must not be taken as a precedent for any other, as I do not suppose the same state of facts will ever occur again.

*Appeal allowed. Case remitted for rehearing.*

Solicitors for appellant: *Willis & Willis, for A. Lionel Gale, Gloucester.*

Solicitors for respondent: *W. & W. Stocken, for Langley-Smith & Son, Gloucester.*

G. A. S.

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[COURT OF CRIMINAL APPEAL.]

1916 *Aug.* 22.

## THE KING *v.* SIMMONITE.

*Criminal Law—Indictment for Incest—Conviction of Indecent Assault—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *ss.* 4, 9—*Punishment of Incest Act*, 1908 (8 *Edw.* 7, *c.* 45), *s.* 4, *sub-s.* 3.

By s. 4 of the Criminal Law Amendment Act, 1885, any person who unlawfully and carnally knows any girl under the age of thirteen years is guilty of felony.

By s. 9, upon the trial of any indictment for any offence made felony by s. 4 the jury may acquit the defendant of the felony and find him guilty of an offence under (inter alia) s. 4 or of an indecent assault.

By s. 4, sub-s. 3, of the Punishment of Incest Act, 1908, on the trial of an indictment for an offence under that Act the jury may acquit the defendant of an offence under that Act and find him guilty of an offence under s. 4 of the Criminal Law Amendment Act, 1885.

The appellant was tried upon an indictment which in form charged him with incest with his daughter, a girl nine years of age. The jury acquitted him of incest, but found him guilty of indecent assault:—

*Held*, that (the indictment being for incest with a girl under the age of thirteen) the conviction was good in law, inasmuch as s. 4, sub-s. 3, of the Punishment of Incest Act, 1908, means that on the trial of a person for incest the jury may, if they think fit, convict him of an offence which is punishable under s. 4 of the Criminal Law Amendment Act, 1885, and by virtue of s. 9 of that Act indecent assault is one of those offences.

*Held*, further, that, although the indictment was in its form and terms laid under the Act of 1908, it carried with it a charge of an

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offence made felony under s. 4 of the Act of 1885; that therefore s. 9 of that Act applied, and the appellant was properly convicted of indecent assault.

APPEAL by the prisoner Joseph Simmonite against his conviction.

On July 17, 1916, the prisoner was tried at the Leeds Summer Assizes before Shearman J. and a jury upon an indictment charging him with incest contrary to s. 1 of the Punishment of Incest Act, 1908. The indictment (so far as material) alleged that "on or about May 15, 1916, you being a male person had carnal knowledge of a female person to wit one Harriet Pollard who is and was to your knowledge your daughter she the said Harriet Pollard then being a girl under the age of thirteen years, namely of the age of nine years."

In summing up to the jury the learned judge expressed the opinion that upon the evidence he did not think they ought to convict him of the full crime of incest, but that it was open to them to find him guilty either of attempted incest or of indecent assault.

The jury found the prisoner guilty of indecent assault. The prisoner appealed.

*C. Paley Scott*, for the appellant. The appellant was indicted for incest, and he can be convicted of the different crime of indecent assault only by virtue of some statutory authority. There is no statutory authority which supports the conviction. In s. 4, sub-s. 3, of the Punishment of Incest Act, 1908, which enacts that if on the trial of any indictment for an offence under that Act the jury are satisfied that the defendant is "guilty of any offence under sections four or five of the Criminal Law Amendment Act, 1885" (1), they

(1) Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4: "Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony. . . ."

Sect. 9: "If upon the trial of any indictment for rape, or any offence made felony by section four of this Act, the jury shall be satisfied that the defendant is guilty of an offence under section three, four or five of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault. . . . ."

Punishment of Incest Act, 1908

may find him guilty of an offence under either of those sections, the word "under" means "created by." Indecent assault is not mentioned in s. 4 of the Criminal Law Amendment Act, 1885, and a person can only be convicted of it upon a trial under that section for felony and by the aid of s. 9 of the Act of 1885. The fact that s. 9 was added to the statute shows that indecent assault is not an offence "under" s. 4. The offence of indecent assault upon a female was created by the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 52. Assault is no element in the crime of incest.

The appellant could only have been convicted of indecent assault if he had been indicted under s. 4 of the Act of 1885. A person indicted under the Incest Act, 1908, cannot be considered as also indicted under the Act of 1885. By s. 3, sub-s. 1, of the Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), the indictment must contain a statement of the specific offence charged, and if the offence is statutory, clause 4 of the First Schedule to the Act requires a reference in the indictment to the statute creating the offence. The appellant was charged under the Punishment of Incest Act, 1908, alone, there being only one count in the indictment. [Archbold's Criminal Pleading, 24th ed., pp. 227, 1004, 1005, 1023, was also referred to.]

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(8 Edw. 7, c. 45), s. 4, sub-s. 3: "If, on the trial of any indictment for an offence under this Act, the jury are satisfied that the defendant is guilty of any offence under sections four or five of the Criminal Law Amendment Act, 1885, but are not satisfied that the defendant is guilty of an offence under this Act, the jury may acquit the defendant of an offence under this Act and find him guilty of an offence under sections four or five of the Criminal Law Amendment Act, 1885 . . . ."

Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), s. 3, sub-s. 1: "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

First Schedule, clause 4, sub-clause 1: "A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged shall be set out in the indictment in a separate paragraph called a count."

By sub-clause 3, "if the offence charged is one created by statute, the statement of the offence shall contain a reference to the section of the statute creating the offence."

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*T. E. Ellison*, for the prosecution. The indictment is laid not merely under the Punishment of Incest Act, 1908, but also under the Criminal Law Amendment Act, 1885. It contains in it all the essentials of the felony under s. 4 of the Act of 1885 of carnal knowledge of a girl under the age of thirteen years. If at the trial it had turned out that the appellant was not the father of the girl, he could have been convicted under s. 4 of the Act of 1885. Although in form he is indicted under the Punishment of Incest Act, 1908, he must be looked upon as indicted under that Act and also the Act of 1885 and can be convicted under either statute.

*C. Paley Scott* in reply. If the indictment is looked upon as one under the Criminal Law Amendment Act, 1885, it is bad for failure to refer to the section of the Act under which it is laid.

The judgment of the COURT (Lord Reading C.J., Darling and Bray JJ.) was delivered by

LORD READING C.J. The appellant was indicted for an offence under the Punishment of Incest Act, 1908, with his daughter, a girl nine years of age. He was convicted of indecent assault and was sentenced to twelve months' imprisonment. It was contended upon his behalf that the conviction is wrong because in law he could not be convicted on this indictment of indecent assault. The point is of importance under the Punishment of Incest Act, 1908. [Having read s. 4, sub-s. 3, of the Act of 1908, his Lordship continued:] That means that a person indicted for an offence under the Act may, nevertheless, be convicted of an offence under s. 4 of the Criminal Law Amendment Act, 1885, if the jury think fit upon the facts so to convict him, and be acquitted of the offence of incest. By s. 4 of the Criminal Law Amendment Act, 1885, the offence of unlawfully carnally knowing a girl under the age of thirteen is created and is made a felony. By s. 9 of that Act a person who is indicted for a felony under s. 4 may be found guilty of indecent assault. The question in the present case is whether, upon this indictment under the Punishment of Incest Act, 1908, the appellant can, by virtue of s. 9 of the Criminal Law Amendment Act, 1885, be found guilty of indecent assault. On behalf of the appellant it has been contended that he cannot be convicted of indecent assault because s. 4 of the Punishment of Incest Act, 1908, must be read as

if the words "guilty of an offence under" s. 4 of the Criminal Law Amendment Act, 1885, were "guilty of an offence created by" s. 4 of the Criminal Law Amendment Act, 1885.

We are of opinion that that is not the true meaning of the language of the statute. What was intended was that that which could be punished as an offence under s. 4 of the Criminal Law Amendment Act, 1885, could be punished although the indictment was in form for an offence under the Punishment of Incest Act, 1908. To place the construction upon the statute contended for by Mr. Paley Scott would be to introduce words which are not there, and would be giving a highly technical meaning to language used in a section in which Parliament meant to get rid of any technical difficulty by enacting that where a person is charged with an offence under the Punishment of Incest Act, 1908, he could be convicted as though he had been indicted for an offence made punishable under s. 4 of the Criminal Law Amendment Act, 1885. In our view, therefore, the first point fails.

The second ground upon which the case for the appellant was rested was that s. 9 of the Criminal Law Amendment Act, 1885, only applies upon the trial of an indictment for rape or for an offence made felony by s. 4 of that Act. Here again we must ascertain the intention of the Legislature from the language used. In our view when s. 4, sub-s. 3, of the Punishment of Incest Act, 1908, says that on any indictment for an offence under that Act the defendant can be convicted of an offence under s. 4 of the Criminal Law Amendment Act, 1885, it means that, although the indictment in form and in terms is stated to be under the Punishment of Incest Act, 1908, the defendant must be regarded as also indicted under the Act of 1885, and if the jury think fit not to find him guilty under the Punishment of Incest Act, 1908, they may convict him of an offence under s. 4 of the Criminal Law Amendment Act, 1885, and if so s. 9 of the Criminal Law Amendment Act, 1885, immediately applies to the indictment in the present case. Once we have come to this conclusion all difficulties are resolved, because this case must also be regarded as one in which the appellant was indicted under s. 4 of the Criminal Law Amendment Act, 1885. Although the indictment is in form an indictment under the Punishment of Incest Act, 1908, and in accordance with s. 1 of the Indictments Act, 1915, incest

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is the specific offence charged, nevertheless the offence of incest carries with it in the circumstances of this case an indictment for felony under s. 4 of the Criminal Law Amendment Act, 1885. In our view, therefore, s. 9 of that Act in law applies, and the conviction of the appellant for indecent assault is right and must stand.

*Appeal dismissed.*

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution: *Director of Public Prosecutions.*

J. E. A.

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*June* 22, 23, 26, 29.

[IN THE COURT OF APPEAL.]

## MITSUI & CO., LIMITED *v.* WATTS, WATTS & CO., LIMITED.

[1915 M. 1959.]

*Shipping — Charterparty — Breach — Failure to load — "Restraints of Princes"—Reasonable Apprehension—Measure of Damages— Ordinary Course of Business to insure—Penalty Clause—Limitation of Liability.*

By a charterparty, dated June 5, 1914, the defendants, who were shipowners, agreed with the plaintiffs to provide a steamer (name to be declared at least twenty-one days before expected date of readiness) to proceed to Marioupol, in the Sea of Azoff, and there load a cargo of 3500 tons of sulphate of ammonia, and to carry the cargo to a port in Japan and there deliver the same on being paid freight at the rate of 20*s.* per ton. The cargo was to be loaded at the average rate of 500 tons per working day, and the loading was not to commence before September 1, and the charterers had the option of cancelling the charter if the steamer was not ready to receive cargo before noon on September 20. The exceptions clause included "arrests and restraints of princes, rulers, and people," and clause 13 was as follows: "Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight."

On September 1 the defendants declined to name a steamer to perform the charter, giving as a reason that the British Government had prohibited steamers from going to the Black Sea to load. The Government had in fact issued no such prohibition. The plaintiffs accepted the refusal as a repudiation of the charterparty, and they were unable to charter another steamer. The Turkish

Government closed the Dardanelles on September 26 or 27, 1914. If the defendants had sent a steamer in time to commence loading at Marioupol by noon on September 20 she could not have arrived at the Dardanelles on her voyage to Japan before the Dardanelles was closed. The plaintiffs had purchased the sulphate of ammonia under a contract dated April 23, 1914, and in consequence of the defendants not sending a steamer to Marioupol to load the plaintiffs failed to take up the ammonia from their sellers and had to pay them by way of compromise of their claim a sum of 4500*l.* as damages, the price of sulphate of ammonia having fallen. In an action by the plaintiffs to recover damages for breach of the charterparty in not sending a steamer to Marioupol to load:—

*Held*, that the defendants had committed a breach of contract in not sending a steamer to load, as there was at the time no existing restraint of princes, nor did a reasonable apprehension, which turned out to be well founded, that the Dardanelles would be closed before the steamer could have passed through on her voyage to Japan justify the defendants under the exception of "restraints of princes" in refusing to send a steamer to load.

*Held*, also, that, though the subsequent closing of the Dardanelles would, if the steamer had been sent to load, have prevented the cargo from being carried to Japan, the damages for the breach were substantial and not merely nominal, inasmuch as, if the cargo had been loaded, insurances, including in the circumstances an insurance against war risks, would in the ordinary course of business have been effected on the value of the cargo at the port of destination; and that the proper measure of damages was the difference between the price which would have been realized by the sale of the cargo in Japan at or about the probable date of arrival and the current price at the port of loading at or about the date when the cargo should have been loaded, together with the freight and cost of insurance, the sum paid by the plaintiffs to their sellers not being an item in the calculation.

*Held*, further, that clause 13 of the charterparty was a penalty clause, and not a limitation of liability clause.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury.

The action was brought to recover damages for breach of a charterparty dated June 5, 1914. By the charterparty it was agreed between the defendants as owners or disponents of a steamer, whose name was to be declared at least twenty-one days before expected date of readiness, and the plaintiffs as charterers that the steamer should with all possible despatch proceed to Marioupol and there load a full and complete cargo of 3500 tons of sulphate of ammonia, and being so loaded should therewith proceed via the Suez Canal to

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a port in Japan as might be ordered by charterers or their agents on signing bills of lading, and there deliver the same on being paid freight at the rate of 20*s.* per ton delivered. By clause 2 the cargo was to be loaded at the average rate of 500 tons per weather working day of twenty-four hours (Sundays and holidays excepted), but not exceeding 500 tons per day in all, counting from the day following receipt during office hours of written notice from the master that steamer was in all respects ready to receive cargo; the charterers having liberty to load on Sundays and holidays without counting such time as lay days.

Clause 7: "Loading time not to commence before 1st September, except by consent of the charterers, who have also the option of cancelling this charter if steamer be not ready to receive cargo before noon on 20th September, 1914. Charterers are not obliged to exercise such option before steamer is ready to load."

Clause 12 excepted (inter alia) "arrests and restraints of princes, rulers, and people."

Clause 13: "Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight."

On September 1 the plaintiffs' agents wrote to the defendants as follows: "Referring to the above charterparty under which the steamer's name should be declared twenty-one days before expected date of readiness, Messrs. Mitsui & Co. will be obliged if you will let them have this information immediately, so that they may advise the suppliers of the cargo." The defendants on the same day wrote in reply that "the above-mentioned charterparty must be considered as cancelled owing to the war. Our Government prohibited steamers going into the Black Sea to load." (This was a mistake, the Government having issued no such prohibition.) On September 3 the plaintiffs wrote to their agents stating that "the shipowners having thought fit to repudiate the charterparty, we shall hold them responsible for the loss we shall sustain in consequence. You will please communicate the above to Messrs. Watts, Watts & Co."; and the letter was accordingly communicated to the defendants. The plaintiffs thereupon brought this action. The defendants had at one time intended to perform the charterparty by their steamship *Henley*, which was at the end of August dis-

charging a cargo at Garston. She was a slow vessel, making about seven and a half miles when loaded. If she had been sent to Marioupol in time to commence loading by noon on September 20, she could not have arrived at the Dardanelles on her voyage to Japan before the Dardanelles was closed.

It appeared that the plaintiffs had bought the sulphate of ammonia under a contract dated April 23, 1914, and that in consequence of the defendants not sending the steamer to Marioupol they failed to take up the sulphate of ammonia from their sellers and paid the sellers as a compromise of their claim in arbitration proceedings the sum of 4500*l.*, the price of sulphate of ammonia having fallen between the date of the contract of April 23, 1914, and the date when the plaintiffs failed to take it up.

In their points of claim the plaintiffs claimed this sum of 4500*l.*, and they also claimed the enhanced value or profit on the said goods had they been delivered in Japan in accordance with the charterparty.

The defendants in paragraph 2 of their defence admitted that they did not send a vessel to load at Marioupol under the charterparty, and alleged that owing to piratical seizures of cargoes by the Turkish Government "and reasonable apprehension of Turkey becoming involved in the European war and of the Dardanelles being thereupon closed they were justified by reason of the exception of arrests and restraints of princes in not sending a vessel to load." They also alleged in paragraph 4 that by reason of clause 13 of the charterparty the damages (if any) recoverable were limited to the estimated amount of freight.

On September 26 or 27, 1914, the Dardanelles was in fact closed by order of the Turkish Government. (1)

Three contentions were raised on behalf of the defendants: (1.) that there was no breach of contract; (2.) that if there was, the damages were nominal, inasmuch as, in the events which happened, the steamer could not have loaded in time to pass through the Dardanelles; and (3.) that, if more than nominal damages were recoverable, under clause 13 of the charterparty the damages were limited to the estimated amount of freight.

(1) On November 5, 1914, war was declared between Great Britain and Turkey.

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BAILHACHE J. read the following judgment (on February 1, 1916) :—This is an action by charterers against shipowners for damages for breach of a charterparty dated June 5, 1914. By this charterparty the defendants were to provide a steamer (name to be declared at least twenty-one days before expected date of readiness) to proceed to Marioupol, a port in the Sea of Azoff, and there load a cargo of 3500 tons of sulphate of ammonia and to carry the cargo to Japan. The cargo was to be loaded at the average rate of 500 tons per weather working day, Sundays and holidays excepted, loading time not to commence before September 1, and the cancelling date was noon on September 20, 1914. The exceptions clause included restraints of princes, and clause 13 ran : " Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight." The freight was 20*s.* per ton.

The plaintiffs had bought the sulphate of ammonia under a contract dated April 23, 1914, and under the sale contract the sellers were to deliver f.o.b. a maximum quantity of 500 tons per weather working day, Sundays and holidays excepted. As the defendants had not declared a steamship to load under the charterparty, the plaintiffs wrote asking for the name of the steamship on September 1, 1914. The defendants replied on the same day declining to name any steamship and giving as a reason that the British Government had prohibited steamers from going to the Black Sea to load. The Government had in fact issued no such prohibition. The plaintiffs accepted the defendants' refusal as a repudiation of the charterparty, and such refusal is the breach complained of.

It appears that the defendants had at one time intended to perform the charterparty by their steamship *Henley*, and she was at the end of August discharging a cargo at Garston. She is a slow boat making eight knots in ballast and seven and a half knots loaded. The Dardanelles was closed by the Turks on September 26 or 27, 1914, and has remained closed ever since.

The defendants in answer to the claim for damages make three points: first, no breach; second, no damage; third, if damage, then liability limited to estimated amount of freight. This last point was not argued before me, as I had already decided in another case (1) that a clause in the same form as clause 13 of the charterparty

(1) *Wall* v. *Rederiaktiebolaget Luggude* [1915] 3 K. B. 66.

is a penalty clause and not a limitation of liability clause, but the point was taken to keep it open to the defendants in the event of my deciding the other points against them, and it is sufficient to say that as to this third point I adhere to my former opinion.

Turning now to the other points, the defendants contend that there was no breach of charterparty by them upon the grounds set out in paragraph 2 of their points of defence, except that they did not rely upon the allegation of piratical seizures of cargoes by the Turkish Government. The paragraph reads thus: "The defendants admit that they did not send a vessel to load at Marioupol under the said charterparty, but say that, owing to piratical seizures of cargoes by the Turkish Government and reasonable apprehension of Turkey becoming involved in the European war and of the Dardanelles being thereupon closed, they were justified, by reason of the exception of arrests and restraints of princes, in not sending a vessel to load." No authority was cited to me in support of the defendants' proposition that a breach of contract is excused by reasonable anticipation of the happening of an event which, if it happens, will excuse the performance of the contract, and in my opinion such a proposition will not bear examination. The closing of the Dardanelles was too late for the defendants whether one treats their refusal to send the *Henley* as a repudiation of this contract accepted by the plaintiffs, or whether one regards the contract as still open down to September 20. The defendants were entirely without excuse, and the breach alleged is proved.

The defendants' next point, and the only one now left to be dealt with, is that the breach caused no damage. What in fact happened was that the plaintiffs through their brokers tried the market with a view to chartering against the defendants. No tonnage was available. There was some suggestion of a possible steamer at 60*s.* a ton; but nothing came of this, and after September 26 chartering for Marioupol was hopeless. Had the plaintiffs secured a boat at 60*s.* a ton this loss would have been 7000*l.* As they failed to recharter, the plaintiffs in their turn repudiated their contract with their sellers, and paid them as the result of arbitration proceedings 4500*l.* for so doing. The plaintiffs satisfied me that if they could have got the sulphate of ammonia to Japan they would have sold it on the market there at a profit to themselves of some 3800*l.*

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The plaintiffs say the normal measure of damages against a shipowner who fails to load a cargo is the extra cost of chartering against him, and, where that is impossible, the cost of replacing the goods at their destination at about their due date of arrival, less the value of the goods at their loading port, and the cost of transport including insurance, and they say the price they would have got for the goods in Japan, selling them in the market, is a fair criterion of the price they would have had to pay to replace them, or, putting the matter in a rather different form, is the fair criterion of the value of the goods to them in Japan. I agree that this measure of damage, whichever way it is expressed, is a sound alternative to the extra cost of rechartering, and is, I think, well within the reasoning, and indeed the decision, of the House of Lords in *Ströms Bruks Aktie Bolag* v. *Hutchison*. (1) The plaintiffs further say, as they did not, and could not, charter against the defendants, and as the extra cost of so doing had it been possible would have been 7000*l*., they are entitled to all the damages they actually suffered up to that sum, even though some of the damages may be in law too remote, and they seek to add to the sum of 3800*l*. the 4500*l*. they paid their sellers as damages for their breach of contract, but admit that they cannot recover more than 7000*l*. in respect of those two amounts. The point tempts one to discussion, but as I have by no means done with the case, I refrain, and content myself with saying I cannot accept it. The damages the plaintiffs paid for breaking their contract with their sellers were, and must remain, too remote.

The plaintiffs' claim for damages is thus reduced to 3800*l*. The defendants do not object to this claim as being in theory the wrong measure of damages, nor do they challenge its accuracy in amount, but they say those damages do not in this particular case flow from their breach of contract. They say if they had performed the contract to the letter the plaintiffs would be no better off. They put their case in this way. The defendants would have performed their contract by having the *Henley* at Marioupol on September 20. The cargo was 3500 tons to be loaded at 500 tons per weather working day (Sundays and holidays excepted). Assuming fine weather, that gave her at least eight days for loading. For a boat of the *Henley's* speed it is from four to five days' sail from Marioupol

(1) [1905] A. C. 515.

to the Dardanelles. The *Henley* would therefore without any breach of contract have arrived at the Dardanelles on, say, October 2, only to find that the Dardanelles had been shut for a week, and the only result of sending the *Henley* to Marioupol would have been that the *Henley* with the plaintiffs' cargo on board would still be in the Black Sea, if not at the bottom of it. It was suggested by the plaintiffs that the matter must be considered from the point of view of the *Henley's* position when the defendants repudiated the charterparty, and that if she would have been at Marioupol before September 20 calculations as to time must be based upon such earlier date. I am satisfied, however, that the *Henley*, even if sent straight from Garston, would not have done more than keep her cancelling date. I am prepared to assume in the plaintiffs' favour that there might possibly have been by a judicious expenditure of money some acceleration of the loading time, but I cannot bring myself to believe that had the *Henley* arrived and begun to load at Marioupol by noon on September 20 she could have got down to the Dardanelles in time to get through. The suggestion of acceleration by "backsheesh" is indeed irrelevant when the question is, as here, what would have been the position if the defendants had fulfilled their contract to the letter. Nor, I think, can the plaintiffs say that if longer notice of refusal to send the *Henley* had been given they could have secured an earlier boat. The defendants were only bound to declare their steamship twenty-one days before September 20. Their refusal was on September 1, and I am satisfied that had it been on August 29 or 30 the plaintiffs' position would have been no better.

It must further be borne in mind that, if the defendants had kept the *Henley's* cancelling date and taken the cargo on board, her failure to reach the Dardanelles on her outward voyage to Japan before the passage was closed would have been no breach of contract, as the charterparty contains the usual exception of restraints of princes. If one pauses at this point, it looks as though the defendants had made out their answer, and as if the damages suffered by the plaintiffs did not flow from the defendants' breach of contract, but from the closing of the Dardanelles, an event for which the defendants are in no way responsible. In arriving at this interim conclusion I have not forgotten that the burden of proving that their breach caused no damage lies upon the defendants, who must

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prove it, not as a matter of possibility or even of probability, but as a practical certainty.

The plaintiffs say, however, that the matter does not stop here. They contend that the damages ought to be assessed at the date of the breach without regard to subsequent events. I see great difficulties in accepting this proposition in a case of this kind. It seems to me that when the plaintiffs ask for substantial as opposed to nominal damages they must show that the damages they claim did in fact result from the defendants' breach of contract, and that if before those damages are ascertained in due process of litigation it can be shown that they did not so result, the defendants are entitled so to do.

The plaintiffs make one last point, and say that if subsequent circumstances are to be taken into account all the circumstances must be looked at, and that insurance has been so far forgotten. They point out that, even assuming their cargo would still be on the wrong side of the Dardanelles, it would be there in the defendants' steamship and would be covered by insurance, that the closing of the Dardanelles for so long a period would have operated to defeat the adventure, and that they would have had a claim on their underwriters as for a total loss : see the recent case of *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* in the House of Lords. (1) The plaintiffs proved that the venture was insurable, and I am satisfied that it would have been insured for a sum sufficient to cover the cost of the goods, the freight, the cost of insurance, and a reasonable sum for profit. The plaintiffs would have taken and paid for the goods if the *Henley* had duly arrived at Marioupol, and would have recovered in full under their policy, less, of course, the freight. I am further satisfied that the profit insured would not have been less than 3800*l.* The value of the cargo was somewhere about 40,000*l.* This right of recovery under their insurance policy they have lost by the defendants' failure to provide a steamship to load the cargo, nor can this loss, in my opinion, be said to be too remote. Insurance is now a universal accompaniment and an essential part of every trading venture involving carriage by sea. The plaintiffs have not paid for the goods, nor have they paid freight or insurance, and I shall therefore put them in the same position as if the *Henley*

(1) [1916] 1 A. C. 650.

had arrived in due course if I give them 3800*l.* This is just what the Courts endeavour to do when awarding damages in a commercial case to a person whose contract has been broken without excuse.

I may add that I should have been prepared to go further if the plaintiffs had taken the goods and paid for them. I should have favourably considered a claim for storage charges and loss of interest. As this has not been done, my judgment is for the plaintiffs for 3800*l.* with costs.

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The defendants appealed, and the plaintiffs served notice of cross-appeal as to the claim for the sum of 4500*l.*

*Leck, K.C.*, and *Raeburn*, for the defendants. First, there was no breach of the charterparty by the defendants. The defendants were under no obligation to send a steamer to Marioupol to load before September 20, and if they had sent the *Henley* there on that day the loading could not have been completed, as the learned judge has found, in time to allow her to pass through the Dardanelles. The shipowners were entitled in the circumstances to exercise their judgment by not sending a steamer to load, and as the subsequent events showed that they were right in the course they took, there was no breach of contract. The shipowners need not go on performing the contract until the exceptions actually prevent its further performance. They took the risk of it turning out that the excepted perils did not prevent the further performance of the contract, and if they can show that they were justified in taking the risk, and that the excepted perils did prevent the performance of the contract, there is no breach of contract. They cannot be held liable for not having performed a useless act. It is not contended that mere apprehension of a restraint of princes is a sufficient excuse. The action of the shipowners must be justified by events. In *Geipel* v. *Smith* (1) the shipowners were held excused by the exception of "restraint of princes" from performing their contract to load a cargo of coals for Hamburg when before the time for performance of the contract had arrived war was declared between France and Germany and Hamburg was blockaded by the French fleet. So too in *Nobel's Explosives Co.* v. *Jenkins & Co.* (2) the shipowners

(1) (1872) L. R. 7 Q. B. 404. (2) [1896] 2 Q. B. 326.

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were held excused from proceeding with a cargo of contraband from Hong Kong, at which port the ship had called, for Yokohama, war having been declared between China and Japan and there being great danger of the ship being captured by Chinese warships. *Embiricos* v. *Reid & Co.* (1) is to the like effect. In the present case the restraint of princes was in existence at the material time, namely, when the vessel would in the ordinary course have passed through the Dardanelles, and operated to prevent the performance of the contract. There was therefore no breach.

Secondly, if the defendants committed a breach of contract, the damages are only nominal. Owing to the closing of the Dardanelles on September 26 or 27 the steamer, if sent to Marioupol on September 20, could not have loaded in time to pass through the Dardanelles. It would have been a futile act to have sent a vessel to Marioupol. Therefore the contract could not have been performed even if the vessel had loaded the cargo at Marioupol. The loss occurred, not through any breach of contract by the defendants, but through the closing of the Dardanelles, which was a restraint of princes. The learned judge was wrong in taking the question of insurance into consideration and assessing the damages on the basis that the venture could have been insured if the goods had been put on board the vessel. There was in the first place no evidence that the plaintiffs were trying to effect or even contemplated an insurance which would have included war risks. But even if they had, this basis of damage is too problematical and remote; damages on such a basis do not arise naturally from the breach of contract, nor were they in the contemplation of the parties at the time they made the contract as the probable result of the breach. It is entirely novel to include as an item of damage the amount of the insurance which the plaintiffs might have effected. The defendants moreover by their breach of contract did not prevent the plaintiffs from insuring. The plaintiffs could have insured from warehouse to warehouse, and need not have waited to insure until the goods were on board the vessel. Even if the question of insurance could be taken into consideration in assessing the damages, the learned judge, in awarding the plaintiffs 3800*l.* damages as the profit which might have been insured, by

(1) [1914] 3 K. B. 45.

some mistake only took into consideration the premium for an ordinary marine risk policy and omitted to deduct the premium for a war risks policy. This would reduce the 3800*l.* to a very much smaller sum.

Thirdly, clause 13 of the charterparty is a limitation of liability clause and not a penalty clause, and therefore in any event the damages are limited to 3500*l.*, being the amount of the freight at 20*s.* a ton on 3500 tons. The words of the clause read in their ordinary acceptation are clearly words intended to limit the liability of the shipowners and not to impose a penalty. There is nothing penal about the clause. The decision of Bailhache J. in *Wall* v. *Rederiaktiebolaget Luggude* (1), which he followed in the present case, was wrong.

*Leslie Scott, K.C.*, and *R. A. Wright*, for the plaintiffs, were not called upon to argue the first point raised by the defendants, namely, that there was no breach of contract.

With regard to the last point, clause 13 is a penalty clause and not a limitation of liability clause. The old form of clause was "Penalty for non-performance of this agreement estimated amount of freight." That is clearly a penalty clause and is inoperative: *Godard* v. *Gray* (2); Scrutton on Charterparties, 7th ed., pp. 347, 348. The view of Bailhache J. in *Wall* v. *Rederiaktiebolaget Luggude* (1) that clause 13 of the present charterparty is merely the old penalty clause writ large is correct. The clause commences with the word "penalty," and where the parties have called the sum a penalty that fact, as Lord Esher M.R. said in *Willson* v. *Love* (3), though not in itself decisive, is not to be altogether disregarded, and "where the parties themselves call the sum made payable a 'penalty' the onus lies on those who seek to show that it is to be payable as liquidated damages." Everything tends to show that the clause is a penalty clause. Moreover, if there is any ambiguity in it, it must be construed against the shipowners who seek to protect themselves under it: *Elderslie Steamship Co.* v. *Borthwick.* (4) The clause is too vague to protect the shipowners. The arguments on which the plaintiffs rely upon this point are fully stated in the report of the arguments for the plaintiffs in *Wall's Case.* (1)

(1) [1915] 3 K. B. 66.
(2) (1870) L. R. 6 Q. B. 139, 147.
(3) [1896] 1 Q. B. 626, 629, 630.
(4) [1905] A. C. 93, 96, 97.

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Next, the plaintiffs are entitled to recover the profit which they would have made if the goods had been carried to Japan. The general measure of damages is that stated by Lord Davey in *Ströms Bruks Aktie Bolag* v. *Hutchison* (1): "The proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance." If the goods had been carried to Japan, the plaintiffs would not only have made the profit on them but would not have had to pay 4500*l.* to their sellers, and therefore they are entitled to recover that sum in addition to the profit. In claiming this sum the plaintiffs "are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case": per Lord Macnaghten in *Ströms Bruks Aktie Bolag* v. *Hutchison*. (2) As to the objection that if the vessel had been sent to Marioupol she could not have loaded in time to pass through the Dardanelles, and that therefore the loss occurred through a restraint of princes and not through the breach of contract, it is now an ordinary incident in commerce to insure the venture when the goods are loaded, and the learned judge has found that the profit on the venture would have been 3800*l.* This is a business transaction, and what is usual, and indeed universal, in business must be regarded. Against the party committing a breach every reasonable presumption ought to be made, and it lies upon him to show that his breach caused no damage. It is admitted that in arriving at the profit the premium on insurance against war risks must in the circumstances be deducted, and this will reduce the 3800*l.*

*Leck, K.C.*, in reply. As to the cross-appeal, the plaintiffs are not entitled to recover the 4500*l.* which they paid to their sellers for the breach of contract with them. The defendants have no concern with that contract, and those damages are too remote.

With regard to the case of *Ströms Bruks Aktie Bolag* v. *Hutchison* (3), the measure of damages there laid down cannot be applied because the Dardanelles was closed and the goods could not have been carried to their destination.

*Cur. adv. vult.*

(1) [1905] A. C. 515, 529. (2) [1905] A. C. 526.
(3) [1905] A. C 515.

June 29. SWINFEN EADY L.J. The defendants raise three contentions. They say, first, that there was no breach of the charterparty; secondly, that, if there was a breach, the plaintiffs are only entitled to nominal damages; and, thirdly, that if they are wrong on both the above contentions, and if the plaintiffs are entitled to recover substantial damages, by reason of clause 13 in the charterparty the damages are limited to 3500*l*. [The Lord Justice referred to the material clauses of the charterparty.] The plaintiffs had entered into a contract for the purchase of a cargo of sulphate of ammonia, but the defendants failed to send a vessel to Marioupol to load. On September 1 the plaintiffs' agents wrote to the defendants with reference to the clause in the charterparty under which the steamer's name had to be declared at least twenty-one days before the expected date of readiness, stating that they would be obliged if the defendants would let them have this information immediately so that they might advise the suppliers of the cargo. In reply the defendants wrote that the charter must be considered as cancelled owing to the war, adding that "our Government prohibited steamers going into the Black Sea to load." This was accepted by the plaintiffs as a repudiation of the contract, and this action was brought. The ground stated in the letter, that the Government had prohibited steamers going into the Black Sea to load, was inaccurate. The British Admiralty may have looked upon a voyage to the Black Sea at this time as a dangerous voyage, and as one not coming within the Government scheme of marine insurance, but the writers of the letter were under a misapprehension in saying that the Government had prohibited steamers from going to the Black Sea to load. Except for the increased danger there was no reason why the steamer should not have proceeded there to load. The Dardanelles was open at this time, and, having regard to the terms of the charter, the defendants were bound to send a steamer to load this cargo. It was urged that at a later date the Dardanelles was closed, and that if a steamer had been sent to Marioupol not later than the cancelling date, and had then loaded the cargo, having regard to the subsequent closing of the Dardanelles, the cargo could not have been carried to Japan. There was, however, nothing at this date to excuse the defendants from their obligation to send a

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steamer to load. In *Geipel* v. *Smith* (1), which was relied upon by the defendants, at the date of the alleged breach the performance of the one entire contract was rendered impossible by an obstacle within the exception of restraints of princes, the removal of which within a reasonable time could not have been expected. In the present case at the date of the alleged breach there was nothing to prevent the vessel going to Marioupol to load pursuant to the terms of the charterparty. Bailhache J. said: "No authority was cited to me in support of the defendants' proposition that a breach of contract is excused by reasonable anticipation of the happening of an event which, if it happens, will excuse the performance of the contract, and in my opinion such a proposition will not bear examination. The closing of the Dardanelles was too late for the defendants whether one treats their refusal to send the *Henley* as a repudiation of this contract accepted by the plaintiffs, or whether one regards the contract as still open down to September 20. The defendants were entirely without excuse, and the breach alleged is proved." I concur in the view of the learned judge, and in my opinion the defendants committed a breach of contract in not sending the vessel to load pursuant to the charterparty.

The second question relates to the measure of damages. It is said that, assuming that there was a breach of contract, the plaintiffs are entitled to nominal damages only. The contention is that the breach was not the cause of the failure to carry the cargo to Japan; that apart from the breach the cargo could not have been carried there. It is put in this way. Having regard to the cancelling date, September 20, to the maximum rate of loading, 500 tons a day, and to the quantity of cargo, 3500 tons, it would have taken seven working days to load, and, having regard also to the time the steamer would have taken to go from Marioupol to the Dardanelles, the Dardanelles would have been closed before the steamer could have arrived there; and therefore the closing of the Dardanelles, and not the breach of contract, prevented the cargo from being carried to Japan, and that thus the voyage would have been prevented by a restraint of princes, and that the defendants would have been under no liability. That, however, is only stating part of the proposi-

(1) L. R. 7 Q. B. 404.

tion. If the steamer had been loaded, in the events which happened the plaintiffs would have obtained the same benefit as if the cargo had been carried to Japan. In considering whether the plaintiffs are entitled to recover more than nominal damages, regard must be had to the ordinary rule as to the measure of damages in an action for breach of contract. Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself. That is the ordinary rule as laid down in *Hadley* v. *Baxendale.* (1) If one applies the ordinary course of business, this would have happened. Assuming that the defendants had sent the vessel to Marioupol, the sulphate of ammonia would have been loaded on board and proper insurances on the cargo would have been effected. The shippers would then have been in this position: either the vessel would have arrived in due course in Japan, when they would have received the proceeds of the sale of the cargo there, or the vessel would have been prevented by a restraint of princes or some other cause from proceeding to Japan, when the shippers would have been entitled to recover under the policy. Either under the policy or by the safe arrival of the ship the plaintiffs would have obtained the benefit of their contract. Therefore the damages must be more than nominal.

That being so, how are those damages to be measured? In a case of this kind the amount which would have been received if the contract had been kept is the proper measure of damages for breach of the contract. What would have been received if the contract had been kept? The learned judge awarded the plaintiffs 3800*l.* In my opinion that figure does not represent the true measure of damages. It was urged by the defendants in the first place that in arriving at that figure the learned judge had taken into account that the plaintiffs would have effected an insurance against war risks, but that there was no evidence that the plaintiffs had any intention of effecting such insurance. As the argument proceeded it became evident that, if the defendants were liable for substantial damages, it would be to their advantage to

(1) (1854) 9 Ex. 341.

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argue the other way, because if they were under that liability the greater the cost of insuring the cargo the less the plaintiffs would have received from the venture, and therefore the amount of the damages would be reduced; and if the plaintiffs had effected an insurance against the consequences of hostilities the premium payable in respect thereof would have been an expense of getting the cargo to Japan, and therefore an additional sum to deduct from the selling price of the cargo. That sum was not taken into account by the learned judge. I think that the learned judge fell into another error which told against the plaintiffs. In assessing the 3800*l.* as the amount of the damages, that is, the probable profit, he gave credit to the defendants for the higher cost of the sulphate of ammonia under a contract of purchase into which the plaintiffs had previously entered. Between the date of that contract and the date at which the steamer ought to have been loaded at Marioupol there was a substantial fall in the price of sulphate of ammonia. The learned judge did not take the cost at the port of loading at or about the date of loading, but he took the contract price, the effect of which was materially to diminish the profit which the plaintiffs would have made. In those two respects it seems to me that the proper measure of damages was not taken, and that the judgment was erroneous.

What is the proper measure of damages in a case of this kind? In *Ströms Bruks Aktie Bolag* v. *Hutchison* (1) the only question upon the appeal was the measure of damages for the breach of contract. The plaintiffs had secured tonnage for their wood pulp from Sweden to Cardiff. The defendants, the shipowners, failed to fulfil their obligation, in consequence of which the wood pulp was not delivered at Cardiff, and the persons to whom the plaintiffs had sold it at Cardiff bought in against them. The plaintiffs paid their purchasers the difference in price resulting from the wood pulp having been so bought in and claimed this sum from the defendants as the measure of their damages. That was not the true measure. The defendants, the shipowners, were not concerned with the particular contract into which the plaintiffs, the charterers, had entered, any more than in the present case the shipowners have anything to do with the particular contract to purchase the sulphate of ammonia into which the charterers

(1) [1905] A. C. 515.

have entered. Lord Davey stated the rule thus (1): "I am of opinion that the proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance." Applying that rule in the present case, the proper measure of damages is the amount which would have been realized by the sale of the goods in Japan at or about the date when the steamer would in due course have arrived there less the cost of the goods at the current price at the port of loading on or about the date when they would have been loaded, together with the freight and insurance, and, having regard to the circumstances of this case, the cost of insurance must include the cost of insurance against hostilities. The amount of the damages on that footing has not yet been ascertained, and there will have to be an inquiry for that purpose. Part of the figure is ascertained. There is no dispute as to the amount which the cargo would have realized on sale in Japan at the date on which the steamer would have arrived there in due course. It must be taken that the cargo would have been insured for that amount. From that sum there must be deducted the cost, freight, and insurance. At what date should the cost price be ascertained? I think the proper date to take is a middle date between the first date for loading mentioned in the charterparty, September 1, and the cancelling date, September 20. There is no evidence as to whether there was any fluctuation in the price of sulphate of ammonia that would make one date between September 1 and 20 more advantageous to either party than another. Therefore I take the nearest date, which is not a Sunday or a public holiday, to September 10 as the date which the parties must have contemplated for the loading. That fixes the mode in which damages should be arrived at. It was put forward on behalf of the plaintiffs that they had sustained a large loss as between themselves and their vendors, and that they had paid by way of compromise in arbitration proceedings a sum of 4500*l.* as damages for breach of their contract. The sum so paid, however, cannot as such be an item in the calculation of damages; it must be ignored.

There remains the third [illegible]. It is contended that, having

(1) [1905] A. C. 529.

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regard to clause 13 of the charterparty, the general damages recoverable are limited to 3500*l.*, the estimated amount of freight. This clause is a little different from the clause which used formerly to be inserted in charterparties. The old form was "Penalty for non-performance of this agreement estimated amount of freight." There is no doubt that in such a case the estimated amount of the freight was a penalty. On proof of the breach judgment could have been recovered for the amount of the penalty, but only as a penalty, and execution would have been limited to the damages which were proved, the judgment only standing as security for such damages. That was the position if the action was brought in respect of the penalty. At the same time the plaintiff would have been entitled to sue for general damages, and he would have recovered whatever damages were proved to have resulted in the ordinary course. In the present charterparty the clause runs thus: "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight." It is a form which seems to have been in use for a considerable time, because in Scrutton on Charterparties, 4th ed., p. 322, published in 1899, the form given is in substantially the same language—"penalty for non-performance of this agreement to be proved damages not exceeding estimated amount of freight due under this charter." There is a footnote: "This clause is worthless and unenforceable." Bailhache J. was of opinion that the parties here only intended to express in an extended form the effect of the ordinary penalty clause. He thought that the clause was nothing more than the old common form writ large. That is not quite accurate. Under the old form, as I have pointed out, judgment could be recovered for the penalty as such. Under the amended form the plaintiff could not recover judgment for the entire estimated amount of freight as a penalty, because it is not a penalty. The clause says that the penalty is to be the "proved damages not exceeding the estimated amount of freight." The proved damages as such cannot be a penalty, because that is the sum which the plaintiff is entitled to recover. The learned judge has, however, given the true explanation of the clause, namely, that the framers of the clause endeavoured to state the effect of the old form and they endeavoured to improve it. At any rate the clause comes within that head of the charterparty which purports to provide a

penalty for non-performance of the charter, and it has no reference to a claim for general damages. Whether or not the clause be meaningless as a penalty clause, it does not limit the amount which can be recovered under the charterparty as general damages. Suppose, for instance, an action were brought on the charterparty against the shipowner for breach of the implied condition to supply a seaworthy ship, it might be that the loss would be very great. The action could be brought on the charterparty, although it is usually brought on the bills of lading, and if it were brought effectively on the charterparty it could not be contended that in such a case the damages were so limited. In *Elderslie Steamship Co.* v. *Borthwick* (1) Lord Macnaghten said : " It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words." In my opinion, having regard to the construction of the charterparty as a whole, this clause has no reference to the general damages ; it has only reference to the penalty, and it may be that, owing to the language in which it is expressed, where the clause is in this form there is in strictness no penalty. It cannot, however, be held to limit the general damages recoverable for breach of contract.

In these circumstances I am of opinion that this contention of the defendants fails. The question of the amount of the damages will be referred to the official referee, with leave, if the parties so agree, to substitute a special referee.

PHILLIMORE L.J. I agree with the judgment which has been pronounced.

In the first place, in my opinion Bailhache J. rightly held that the defendants, the shipowners, were liable. This case is clearly distinguishable from *Geipel* v. *Smith*. (2) Where it is certain, or so nearly certain that in commercial matters it can be considered as certain, that the adventure cannot be successfully completed, the shipowner or charterer may be excused from taking preliminary steps which will obviously be futile. If the port to which the ship is to go is blockaded under an operation of war, the rule being that the termination of war is so uncertain that the state of war is to be

(1) [1905] A. C. 96. (2) L. R. 7 Q. B. 404.

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regarded as indefinitely prolonged, there is no duty to prepare a cargo or to bring a cargo to the port which the ship will not be able to enter. But in this case there was at the moment no reason to suppose that the adventure might not be carried through, though at greater cost because there would be an obvious prudence in insuring against war risks. It was therefore the duty of both parties to perform the contract so long as they could up to the point when its performance would be excused. There was no reason why the ship should not have sailed for Marioupol, and there was a breach of contract by the shipowners in refusing to declare and send a ship.

In the next place, I agree that the damages are not nominal, but substantial. Try the case in this way. If there had been no block in the Dardanelles, what would have been the loss to the cargo owners? They would have lost the profit which they would have made upon the transportation of their goods from Marioupol to Japan. The block makes no difference, because in the ordinary course of business the cargo owners would have insured against the loss of their profit. In the case of every contract for transportation, unless the element of insurance is introduced, the damages would have to be calculated on a speculative basis. A charterer says to a shipowner, "You contracted to send your ship to port A. and to transport my cargo to port B. I have lost the profits which I should have made if the ship and cargo had gone to port B." The answer of the shipowner is, "What are those profits? Was there any certainty that the ship would get to port B.? The ship, with your cargo on board, might have been lost by perils of the sea between port A. and port B." That prima facie would be a sound answer. It is the same principle upon which juries are directed in any case in which uncertainty of life or any other uncertainty enters into the question of profits to be earned. But the answer of the charterer is, "The profits which I have lost I could have insured and made certain. The cost of insurance must be deducted from the profits, and then the profits will be treated as certain." That was the right of the plaintiffs in this case. They were entitled to say that, if the defendants had sent their ship to Marioupol, they would in the ordinary course of business have made their profit certain by insuring against loss, being willing to deduct the cost of insurance in order to make their profit certain though smaller, instead of uncertain and larger.

It was upon this principle that the House of Lords laid down the measure of damages in *Ströms Bruks Aktie Bolag* v. *Hutchison*. (1) Looking at the matter in another way it comes within the rule laid down in *Hadley* v. *Baxendale*. (2) The suffering party ought to receive either such damages as may fairly and reasonably be considered as arising according to the usual course of things from such breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. I think that the damages may be supported under either of these heads. It may be said either that in the ordinary nature of things they were certain to follow from the breach of contract, or that the parties must have contemplated that the cargo owners would insure, and that consequently that which they would have recovered under the insurance less the cost of effecting the insurance would be the loss. That being so, I think that Bailhache J. was right in saying that the charterers were entitled to substantial damages. The block in the Dardanelles, which would have stopped the ship from completing her voyage from the Sea of Azoff to Japan, may be regarded for this purpose as permanent, because we know that it lasted until a state of war broke out between Turkey and Great Britain and Russia, when no British or Russian ship could have safely navigated those narrow waters. It is important to remember that a loss by reason of such a permanent block would not be a loss by capture within the f. c. and s. clause; it would be a loss by restraint of princes, or possibly a loss by perils of the sea. If the Turkish Government forbade the navigation of the Dardanelles, it would be a restraint of princes. If all that they did was to make the navigation of the Dardanelles so perilous as to be impracticable, it would be the same as if the Dardanelles had been closed by a block of ice, or as if owing to a convulsion of nature a great rock had fallen into it, making the passage for a time impossible. The cargo owners would have been entitled, if they had had their cargo put on board and had insured the cargo in the ordinary way with the f. c. and s. clause and without provision against war risks, to recover on proof that the Dardanelles was so blocked for so long a time as to make the continuance of the adventure impracticable.

(1) [1905] A. C. 515. (2) 9 Ex. 341.

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In my opinion, however, the learned judge in arriving at the sum of 3800*l.* has been led into a wrong calculation. He has certainly given the plaintiffs too much under one head, and he has probably given them too little under another. He has given them too much because to make the profit certain it was not sufficient to have an ordinary insurance; it was necessary to add to the ordinary insurance an insurance against war risks. The plaintiffs' counsel admitted that it was proper to add to the cost of insurance the cost of insurance against war risks. I understood him to take it at 3000*l.*, and if that figure is correct it would reduce the profit to 800*l.* On the other hand there will almost certainly be an enhancement of those profits. Bailhache J., in order to arrive at the loss of profit, has taken the price at which the plaintiffs bought the sulphate of ammonia in April. If that is the price which they would have had to pay for the ammonia on the date which Swinfen Eady L.J. has intimated as the proper date, namely, September 10, this would be right, but if in fact the ammonia was cheaper on September 10, to that extent the damages are too little. Putting it in another way, the shipowners are entitled to say that they have nothing to do with the contract of purchase which the charterers made in April; that they can only be saddled with the market value of the goods at Marioupol at the proper date; and that they are not chargeable with the amount which the charterers had to pay to their vendors for breach of contract; but if they are entitled to say that, then they cannot rely upon the fact that the charterers under their contract of purchase bought the goods at a higher price. The true price is that at which the goods would have been bought at the date we have fixed. There seems good reason to suppose that this price would be less than the contract price, but how much less does not appear. If the fall was more than 3000*l.*, what the defendants have successfully taken off will be more than counterbalanced by what will be added on this head. If the fall was less than 3000*l.*, the defendants will gain something substantial by their appeal. As I understand, this is the only figure which need be found by the official referee. Given that figure, the rest, as I understand it, is a mere matter of arithmetic.

The remaining question is, Supposing the damages should come to over 3500*l.*, what is the effect of clause 13? I am personally a little

sorry that it is thought we ought to decide that question now, because it is quite likely that it may not arise, but I may be mistaken in that. At any rate, it may be right that we should decide it now, as the matter has been fully argued, and if it is to be decided I concur in the view which the Lord Justice has expressed. But I am bound to say that I concur with great hesitation. I myself belong to the school which holds that when parties say something they should be held to mean what they say, and that artificial constructions should not be put upon their words. It may be that the cases are too strong for me in this respect. I feel great difficulty with this clause. It is at least as old as 1899. At the same time in a case now pending before us for judgment I find that the charterparty contains the older form. So that the two clauses are running side by side. The effect of our decision in this case appears to be this, that the new form is less in favour of the claimant than the old one. Under the old form the claimant could recover the damages, but he could also, if the damages were less than the amount of freight, recover judgment for the penalty, that is, for the amount of freight, which would be of some value to him. Under the new form, as the Lord Justice has pointed out, he cannot get judgment for the penalty; he can only get judgment for the proved damages. It may be that this is the result of the alteration. I do not know. I am not prepared to accede to all the reasoning of Bailhache J. upon this point. Upon the whole, in order to decide this point to-day, I am ready to agree, although reluctantly, with the other members of the Court upon this ground, and upon this ground only, that the parties have used the word "penalty," which prima facie means that it is a penalty, that they have not sufficiently varied from the old form, which had an established construction, to show that they intended that there should be any serious variation other than that which I have mentioned, and that it would have been very easy, if they had meant to frame a limitation of liability clause, to have expressed it in words about which there could be no doubt.

BANKES L.J. I am of the same opinion. I agree that the defendants are not bound by the terms of the contract of April 23, 1914, and that the only materiality of the contract, if it is at all material, is as evidence that the plaintiffs had a cargo ready and available for

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shipment if the defendants had sent their vessel to the port of loading.

The first question is whether the defendants were right in their view that they had any good and sufficient reason for refusing to send the steamer to the port of loading. Bailhache J. has held that they had not, and I agree with him. I do not think it necessary to add anything to what the other members of the Court have said upon this point except to state that in all the cases which have been relied upon by the defendants I think it will be found that there was at the time when the repudiation of the contract occurred an actual existing restraint of princes. In the present case the most that can be said is that there was reasonable apprehension that before the time arrived to complete the performance of the contract a restraint of princes would arise which would prevent its complete performance. In my opinion that is no answer to the allegation that there was a breach of contract. The Dardanelles was closed on September 26 or 27. In those circumstances what was the position of the parties? Bailhache J. has held, rightly I think, that if the defendants had sent a steamer to Marioupol to load the plaintiffs would in the ordinary course of business have insured the cargo; and this insurance would have included war risks. Upon that finding the position was this. There was nothing to prevent the defendants from sending the steamer to Marioupol and nothing to prevent the cargo being loaded. It is true that if the cargo had been loaded in the events which happened the steamer would have been prevented from proceeding to Japan, and as a result the plaintiffs would have been entitled to abandon the cargo to the underwriters on the ground that the adventure had become impossible of performance. If that had been done the plaintiffs would have been entitled to receive from the underwriters the amount for which they had insured the cargo, and, as Bailhache J. put it, the amount for which they would have been insured would have been sufficient to cover the cost of the goods, the freight, the cost of insurance, and a reasonable sum for profit; in other words, the fair value of the goods at the port of destination. In these circumstances it is clear that the plaintiffs are entitled to substantial, and not merely nominal, damages, and I agree as to the proper measure of those damages and the way in which the amount should be ascertained.

There remains one further point upon the construction of clause 13 of the charterparty. It is said on behalf of the defendants that upon the true construction of the exact language of that clause it ought to be interpreted as a clause limiting liability, and not as a penalty clause. If it is open to the shipowners to rely upon a strict construction of the clause, I am not prepared to say that that is not the meaning that ought to be, or at any rate that might be, placed upon it. The plaintiffs' counsel, however, appeal to the principle which has been laid down in many cases, and amongst others in *Elderslie Steamship Co.* v. *Borthwick* (1), where Lord Macnaghten said: "It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words." The history of this clause is this. For a long period of time there has been inserted in charterparties a clause which has come to be known as the penalty clause, and it has been expressed in a well-known form of words. The clause commenced "Penalty for non-performance of this charter," or "this agreement," and it ended with the words "estimated amount of freight." It has been accepted by business men and lawyers that the clause, so commencing and known as the penalty clause, is worthless and unenforceable. In my opinion, applying the principle which Lord Macnaghten stated, if the shipowner desires to clothe his clause with vitality he must dress it up in an entirely new suit of clothes; but so long as its identity is concealed either wholly or partially by the old clothes he cannot escape the application of the rule that if he seeks to limit his liability he must do so in plain words, It cannot be said that he has used plain words so long as the opening words of the clause are in the well-known form which has been accepted to represent a worthless and unenforceable clause. Upon this ground I think that the defendants are not entitled to say that this is a clause limiting their liability.

*Judgment varied.*

Solicitors for plaintiffs: *Waltons & Co.*

Solicitors for defendants: *Holman, Fenwick & Willan.*

(1) [1905] A. C. 96.

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[IN THE COURT OF APPEAL.]

## DAVIES *v.* EDINBURGH LIFE ASSURANCE COMPANY.

[1915 D. 1210.]

*Practice—Costs—Payment into Court with Denial of Liability—Recovery of Less than Sum paid in—Costs of Issues found for Plaintiff —Order* XXII., *r.* 6.

By Order XXII., r. 6, "A plaintiff who does not accept money paid into Court with a denial of liability but proceeds to trial and does not recover more than the sum paid into Court shall not be allowed his costs of the issues as to liability unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in."

In an action to recover damages for personal injuries arising from the negligence of the defendants, they denied the negligence and paid a sum of money into Court with a denial of liability. The plaintiff did not accept the money paid into Court in satisfaction of his claim, and the action went on to trial and resulted in a verdict for a less amount. The judge directed judgment to be entered for the defendants, and the judgment ordered "that the defendants do recover against the plaintiff their costs of this action subsequent to the payment into Court to be taxed":—

*Held*, that, although the rule gave the judge power to deprive the plaintiff of his costs of the issue as to liability, it gave him no power to make the plaintiff pay the defendants' costs of an issue on which the plaintiff had succeeded, and that the judgment must be amended by the addition of the words "other than the costs attributable to the issue of liability."

*Winkle & Co.* v. *Gent & Son* (1914) 31 Rep. Pat. Cas. 473 distinguished.

APPLICATION of the plaintiff for judgment or a new trial in an action tried before Lawrence J. and a special jury at Liverpool.

The plaintiff, a consulting engineer carrying on business in Liverpool, sued the defendants, as the owners of a block of flats or offices in which there was a lift, to recover damages for injuries received by him in an accident to the lift while he was a passenger in it. The defendants by their defence denied their liability, but paid a sum of 450*l.* into Court with a denial of liability. The plaintiff did not accept the money paid in, but went on to trial. At the trial evidence was given (inter alia) as to the amount of the fees

received by the plaintiff in the two years preceding the accident, and eventually the jury found a verdict in favour of the plaintiff, with 200*l.* damages. The learned judge thereupon directed judgment to be entered for the defendants, and by the judgment it was ordered "that the defendants do recover against the plaintiff their costs of this action subsequent to the payment into Court to be taxed." The plaintiff now asked for a new trial on the ground that the amount of damages was obviously and unreasonably inadequate, and also appealed against the order for costs.

By Order XXII., r. 6, "A plaintiff who does not accept money paid into Court with a denial of liability but proceeds to trial and does not recover more than the sum paid into Court shall not be allowed his costs of the issues as to liability unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in."

Lawrence J. at the trial was not asked to certify that there were reasonable grounds for the plaintiff not accepting the sum.

The case is only reported on the point as to costs, the Court holding that on the facts there was no reason for granting a new trial on the ground of the inadequacy of the damages.

*Greer, K.C.*, and *A. R. Kennedy*, for the plaintiff. As to the order for costs, the old rule laid down in *Wagstaffe* v. *Bentley* (1) still remains in force, that when damages are claimed, and there is a denial of liability coupled with payment into Court, the quantum of damages is a distinct issue from that of liability. Under Order LXV., rr. 1, 2, the plaintiff, whatever he recovers, is entitled to his costs on the issue of liability. It is admitted that the effect of Order XXII., r. 6, is that the judge at the trial had jurisdiction to deprive the plaintiff of his costs of the issue as to liability on which he had succeeded, but the rule contains nothing to entitle the defendants to any costs of the issue on which the plaintiff succeeded.

*Rigby Swift, K.C.*, and *Greaves Lord*, for the defendants. The order as to costs is quite right and was made with jurisdiction. Before the last rule the plaintiff got the costs of the issues on which he succeeded, which degenerated into a scandal. To obviate this, Order XXII., r. 6, was amended in 1913, and prevents the plaintiff

(1) [1902] 1 K. B. 124.

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being allowed his costs, unless the judge thinks there is good cause for allowing them.

[SWINFEN EADY L.J. That may be so; but how does the defendant get his costs of an issue on which the plaintiff has succeeded?]

The defendant has succeeded in the action from the time of payment into Court, and is therefore entitled to his costs. The decision in *Winkle & Co.* v. *Gent & Son* (1) is in point and should be followed.

*Greer, K.C.*, in reply.

SWINFEN EADY L.J. This case raises a short point with regard to costs. When the case went to trial there were two issues, one of which was whether the negligence and breach of duty of the defendants had occasioned the accident and had injured the plaintiff. That issue the defendants denied, and that issue was found for the plaintiff. A second issue was whether the sum which was paid into Court by the defendants was sufficient to answer the plaintiff's claim. That issue was determined in favour of the defendants. The effect of the judgment as drawn up is this: that the plaintiff has to bear all the costs, including the costs of the issue on which he succeeded after the date of the payment into Court by the defendants.

Before the addition made in August, 1913, to Order XXII., r. 6, the case as to costs was settled by the authority of the Court of Appeal in *Wagstaffe* v. *Bentley*. (2) That case determined that where there were distinct issues raised, first as to liability and secondly as to whether the amount paid into Court with a denial of liability was sufficient, if the plaintiff succeeded at the trial on the issue of liability but failed to obtain a larger amount than had been paid into Court by the defendants he nevertheless obtained the costs of the issue on which he had succeeded. That was altered by the addition made to Order XXII., r. 6, the effect of which is that in such a case the plaintiff does not obtain the costs of the issue as to liability on which he succeeds unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in. That is provided for by the latter part of the addition to Order XXII., r. 6: "A plaintiff who does not accept money paid into Court with a denial of liability but proceeds to trial and does not recover more

(1) 31 Rep. Pat. Cas. 473. (2) [1902] 1 K. B. 124.

than the sum paid into Court shall not be allowed his costs of the issues as to liability unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in." The effect of that alteration in the rule is to prevent the plaintiff from obtaining the subsequent costs of the issue on which he succeeded without the certificate or expression of opinion from the judge that he is satisfied that there were reasonable grounds for not accepting the sum paid in. The plaintiff did not obtain that certificate in the present case; therefore the plaintiff is unable to obtain the subsequent costs of that issue. But his complaint is, and it seems to me well-founded, that this is no reason why the defendants should have as against him the costs of the issue on which he, the plaintiff, succeeded at the trial. They certainly would not have obtained them before this Order of 1913. On the contrary, the plaintiff would have obtained those costs against the defendants. The effect of the alteration of the rule is to prevent a plaintiff obtaining those costs without a certificate, but it does not give those costs to the defendants.

We were referred to a case of *Winkle & Co.* v. *Gent & Son* (1), but that case is not in conflict with the rule I have mentioned, nor with the view I take of the rule. It will be observed that the defendants in that case by their defence made this offer, and I take the language of the offer from the judgment of Buckley L.J. (2): "The offer was not 'If you make out your case I will undertake in the terms of an injunction.' The offer was 'Whether you are entitled or not we will not stay to dispute. You may take it without more or without proving anything'"; that is to say, the defendants offered an undertaking equivalent to an injunction without further disputing the plaintiff's right. That being so, there was no issue on that part of the case. Then the case went on on the one issue as to whether the sum paid into Court was sufficient or not, and the defendants succeeded on that, and that was the only issue on which the case went to trial. It is quite different here. There are here distinct issues—first, the issue of liability. Are the defendants liable for the accident, and did they injure the plaintiff by their negligence as alleged? That the plaintiff has established. Having established that at the trial, it was not right to draw up the order in such a form

(1) 31 Rep. Pat. Cas. 473. (2) 31 Rep. Pat. Cas. 478.

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that the plaintiff would have to pay the costs of that issue on which he succeeded. The order will have to be corrected, and the judgment corrected and put right in that respect.

The judgment as drawn up is thus expressed: "Therefore it is adjudged that the plaintiff recover nothing against the defendants and that the defendants recover against the plaintiff their costs of this action subsequent to the payment into Court to be taxed"; and the plaintiff rightly complains that that gives the defendants the whole of the subsequent costs of the action. There ought to be excluded from those costs the subsequent costs of the issue on which the defendants failed. The order will run: "That the plaintiff recover nothing against the defendants and that the defendants recover against the plaintiff their costs of this action subsequent to the payment into Court other than the costs attributable to the issue of liability."

Then with regard to the costs of the appeal, the plaintiff was obliged to come here to put the order right in that respect, and having partly succeeded and partly failed, each party will bear their own costs of the appeal.

PHILLIMORE L.J. With regard to the other matter, it really only wants a little attention to the plain words of the rule to make it quite clear. The history of this business may just usefully be repeated, and it seems to me from the various cases which have come before this Court that it wants constant repetition in order to make people understand the matter.

Before the Judicature Act and before a particular decision some time later, no such thing was known as a payment into Court with a denial of liability. Payment into Court was an admission of the cause of action, and the only issue then left to be tried was "is that enough, or is it not?" That issue, or that question, coming before a jury was decided one way or the other, and the event of that decision gave the costs from the time of the payment into Court, because it was the only matter the jury had to inquire into. If they found the sum not enough the plaintiff took all the costs of the action; if they found the sum sufficient the plaintiff lost the costs. Then came a clever invention under which somebody said "If contrary to what the defendant believes or expects, he is

liable: he brings into Court such a sum." That pleading was held in *Berdan* v. *Greenwood* (1) to be a good one, and then Order XXII., r. 1, as it now stands, gave legislative authority to that decision. Since that time in an action brought to recover damages a defendant may with denial of liability pay money into Court. Since that rule has been in force there came the case of *Wagstaffe* v. *Bentley* (2), and the Court there held that, where such a payment had been made and the parties went to trial upon both questions (I do not want to use the words "both issues")—namely, was there liability, and was there enough paid in—those were separate questions, and the "event" mentioned in Order LXV., r. 1, could be read distributively. I explain why I do not like to use the word "issue," because the word "issue" as used in the Order does not mean one of several questions or issues submitted to the trial, but means the formal trial of an issue, such as an interpleader issue: "Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless"—the word "issue" there means the formal interpleader issue, or something of that kind; but in *Wagstaffe* v. *Bentley* (2) the Court decided that the event is distributive, and that therefore, in a case where the jury find the defendant is liable but he has paid enough into Court with a denial of liability, the plaintiff gets his costs of trying the issue of liability, or the question of liability, though he loses the general costs from the time of the payment into Court. Then comes the new rule, which says: "A plaintiff who does not accept money paid into Court with a denial of liability but proceeds to trial and does not recover more than the sum paid into Court shall not be allowed his costs of the issues as to liability unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in." That makes the plaintiff subject to the discretion of the judge. He no longer gets his costs of the issues as to liability as a matter of right. He no longer gets them unless the judge certifies for good cause to the contrary. He has to get a precise order from the judge to give them to him; otherwise the law is left as it was before. He would have got the costs except in certain circumstances, but it remains he is not liable to pay them. For that reason the order proposed by the learned Lord Justice is in my opinion right, and so the appeal

(1) (1878) 3 Ex. D. 251. (2) [1902] 1 K. B. 124.

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to that extent should be allowed, and there should be no costs of the appeal.

BANKES L.J. I agree. With regard to the question of costs I should like to say that, with regard to the case of *Winkle & Co.* v. *Gent & Son* (1), I think that that case must be treated as one where the payment into Court was made without a denial of liability, and that it is no authority for the proposition contended for.

*Appeal as to costs allowed.*

Solicitors for plaintiff: *Cartwright & Cunningham, for Donnison & Edwards, Liverpool.*

Solicitors for defendants: *William Hurd & Sons, for Gradwell & Co., Liverpool.*

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*June* 5, 6, 7; *July* 25.

[IN THE COURT OF APPEAL.]

## THE KING *v.* SPEYER.

*Alien—Naturalization—Privy Councillor—Qualification—Construction of Statutes—Repeal by Implication—Act of Settlement*, 1700 (12 & 13 *Will.* 3, *c.* 2), *s.* 3—*Naturalization Act*, 1870 (33 & 34 *Vict. c.* 14), *s.* 7—*British Nationality and Status of Aliens Act*, 1914 (4 & 5 *Geo.* 5, *c.* 17), *s.* 3.

By s. 3 of the Act of Settlement, 1700, "No person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents), shall be capable to be of the Privy Council . . . ."

By s. 7 of the Naturalization Act, 1870, "An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom . . . ."

By s. 3 of the British Nationality and Status of Aliens Act, 1914, "(1.) A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and, as from

(1) 31 Rep. Pat. Cas. 473.

the date of his naturalization, have to all intents and purposes the status of a natural-born British subject. (2.) Section three of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words 'naturalized or' were omitted therefrom."

The respondent, who was born abroad of foreign parents, became a naturalized British subject in 1892, and was made a member of the Privy Council in 1909:—

*Held*, that the effect of s. 7 of the Naturalization Act, 1870, was to impliedly repeal s. 3 of the Act of Settlement and to render the respondent, after his naturalization, capable of being a member of the Privy Council, and that s. 3, sub-s. 2, of the British Nationality and Status of Aliens Act, 1914, had not revived in the case of a naturalized alien the disqualification for membership of the Privy Council contained in s. 3 of the Act of Settlement, 1700.

Decision of the Divisional Court [1916] 1 K. B. 595 affirmed.

APPEAL from the judgment of a Divisional Court (Lord Reading C.J., Avory and Lush JJ.); reported [1916] 1 K. B. 595.

Rules nisi had been granted calling upon Sir Edgar Speyer and Sir Ernest Joseph Cassel to show cause why informations in the nature of a quo warranto should not be exhibited against them to show by what authority they were, or claimed to be, members of His Majesty's Privy Council for Great Britain.

The rules were obtained by Sir George Makgill on the grounds that both the respondents were born out of the United Kingdom and the dominions thereunto belonging and were not born of English parents, and that by s. 3 of the Act of Settlement (1) and s. 3, sub-s. 2, of the British Nationality and Status of Aliens Act, 1914 (2), they were not capable to be of the Privy Council.

(1) The Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3, provides that "No person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents), shall be capable to be of the Privy Council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him."

(2) The British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 3: "(1.) A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations, duties and liabilities, to which a

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REX v. SPEYER.

The respondent Speyer was born in 1862 outside the King's dominions of alien parents. He became a naturalized British subject in 1892, and was appointed a member of the Privy Council in 1909.

The respondent Cassel was born in Germany in 1852 of alien parents. He became a naturalized British subject in 1878, and was appointed a member of the Privy Council in 1902.

The Divisional Court held that the effect of the Naturalization Act, 1870, was to render the respondents after their naturalization capable of being members of the Privy Council, and that s. 3, sub-s. 2 of the British Nationality and Status of Aliens Act, 1914, had not revived in the case of a naturalized alien the disqualification for membership of the Privy Council contained in s. 3 of the Act of Settlement.

The relator appealed in the case of the respondent Speyer; there was no appeal in the case of the respondent Cassel.

*Powell, K.C.*, and *Claud Mullins*, for the appellant.

*Sir G. Cave, S.-G.*, and *Branson*, for the Clerk to the Privy Council and the Secretary of State for Home Affairs.

*Roskill, K.C.*, and *T. H. Parr*, for the respondent Speyer.

The arguments were the same as in the Divisional Court, except that the preliminary point was not argued. As they are given in extenso in the report of the case below, it is considered unnecessary to repeat them here.

*Cur. adv. vult.*

July 25. SWINFEN EADY L.J. read the following judgment:— This is an appeal from an order of the Divisional Court discharging a rule obtained by Sir George Makgill calling upon Sir Edgar Speyer to show cause why an information in the nature of a quo warranto should not be exhibited against him to show cause by what authority he was, or claimed to be, a member of His Majesty's Privy Council for Great Britain.

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natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject.

"(2.) Section three of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words 'naturalized or' were omitted therefrom."

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Sir Edgar Speyer was born in 1862 outside the King's dominions of alien parents, and, being a German and an alien, on February 29, 1892, became a naturalized British subject. He was sworn of His Majesty's Privy Council for Great Britain on November 22, 1909, and took his place at the Board accordingly.

The appellant insists that Sir Edgar Speyer has been wrongfully and illegally sworn a member of the Privy Council by reason of the provisions of the Act of Settlement (12 & 13 Will. 3, c. 2), s. 3, the Naturalization Act, 1870, and the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 3, sub-s. 2. The question depends upon the true construction of the statutes relating to naturalized British subjects.

At the date of the Act of Settlement, and previous to the passing of that Act, an alien could not be a member of the British Parliament, nor could he possess the parliamentary franchise. If, however, he were naturalized, which at that time could only be done by Act of Parliament, he acquired all the rights, privileges, and capacities whatsoever of a natural-born subject of the King. "And this alien naturalized to all intents and purposes is as a naturall borne subject": Co. Litt. 129a. An alien could, however, be a member of the Privy Council, as neither at common law nor by statute was there any limitation with regard to the persons whom the Sovereign might appoint to be members of his Council. By the Act of Settlement, which provided for the limitation and succession of the Crown as therein specified, it is, by s. 3, enacted as follows: "That after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him." During the course of the hearing we were informed by the Solicitor-General that he had had the Parliament Roll examined, and that the Act appears on the roll in precisely the same manner as it appears in the Revised Edition of the Statutes, including the number and position of the brackets. The object of s. 3 of the Act was to exclude

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persons born abroad, even though naturalized, from filling the offices mentioned, unless born of English parents.

The statute of 1844 (7 & 8 Vict. c. 66), "An Act to amend the laws relating to aliens," for the first time enabled an alien to become naturalized without a special Act of Parliament. It introduced the mode of naturalization by a certificate of a Secretary of State. Sect. 6 provides that an alien so naturalized "shall enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of Her Majesty's Privy Council, nor a member of either House of Parliament, nor of enjoying such other rights and capacities, if any, as shall be specially excepted in and by the certificate to be granted in manner hereinafter mentioned." This s. 6 provides for and determines the effect of naturalization under the Act. Sect. 1 recites, amongst other statutes, the Act of Settlement, and enacts that such parts of the said recited Acts of Parliament as are inconsistent with the provisions of this Act shall be repealed. It was contended that the effect of this provision was to repeal the following words in s. 3 of the Act of Settlement: "or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements, or hereditaments from the Crown, to himself or to any other or others in trust for him." This contention is not well founded. There was no absolute repeal of that part of s. 3, which still remained a portion of the statute. It was only a repeal so far as "inconsistent with the provisions of this Act"; that is equivalent to enacting that, notwithstanding anything in s. 3 of the Act of Settlement to the contrary, the following provisions shall have effect. It makes it clear that the Legislature intended that the provisions in the Act of 1844 should override the Act of Settlement. The Act of 1844 was repealed by the Naturalization Act, 1870.

By the Act of 1870, s. 7, new provisions are enacted for obtaining naturalization by a certificate of a Secretary of State. Clause 3 of that section provides as follows: "An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he

shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect." It thus appears that s. 7 in terms confers "all political and other rights, powers, and privileges . . . . to which a natural-born British subject is entitled . . . . in the United Kingdom." It is incredible that, if the Legislature intended to keep alive the two disabilities for membership of the Privy Council and Parliament respectively, these disabilities should not have been mentioned. They were specifically mentioned in the Act of 1844, which was then under the immediate consideration of Parliament, which was repealing it.

The appellant urged that the Act of 1870 did not confer the "capacity" of being a member of the Privy Council or of Parliament; that the Act of Settlement had provided that an alien, although naturalized, should not be *capable* to be of the Privy Council or a member of Parliament; that the Act of 1844 had used similar language, and had conferred rights and capacities on naturalized persons, except that such persons should not be *capable* of becoming of the Privy Council or a member of Parliament; and he pressed the argument that if in 1870 Parliament had intended to confer on naturalized persons the capacity of becoming a member of the Privy Council or Parliament the word "capacity" would have been used. I cannot accede to this argument. The word "capacity" is not a term of art, or a word having any peculiar force or special meaning. Sect. 6 of the Act of 1844 conferred on naturalized persons all the rights and *capacities* of natural-born subjects with the two exceptions. It cannot be doubted that at least the capacities so conferred are also conferred by s. 7 of the Act of 1870, although the word "capacity" is not used, and if these capacities are conferred by the use of the words "all political and other rights powers and privileges" there is no reason why the fact that the word "capacity" has not been used should be held to exclude from the capacities conferred the two capacities relating to the Privy Council and Parliament. Moreover, if "capacities" are not conferred by naturalization, all the "incapacities" of aliens would remain after naturalization, which would render naturalization nugatory.

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It was further urged by the appellant that if the appointment of Sir Edgar Speyer to the Privy Council was valid when made, yet on the passing of the British Nationality and Status of Aliens Act, 1914, Sir Edgar ceased to be capable of remaining a member of the Privy Council by reason of the language of sub-s. 2 of s. 3 of that Act. The argument was that by s. 3, sub-s. 1, a person to whom a certificate of naturalization is granted is only entitled to "all political and other rights powers and privileges . . . . to which a natural-born British subject is entitled," "*subject to the provisions of this Act*," and that the provision immediately following, namely, sub-s. 2, shows that the Legislature intended in 1914 that a person born abroad and not born of British parents should be disqualified for membership of the Privy Council and Parliament. It is said naturalization has nothing to do with the case. The fact that a person is born abroad and not of British parents is an absolute and irremediable disqualification, except by a special Act of Parliament. But the argument, if sound, ought not to stop there. If s. 3 of the Act of Settlement is still in force as regards persons born abroad, though naturalized, it would appear that the remaining part of s. 3 is also in force and remains operative, and accordingly that such persons born abroad, although naturalized, are nevertheless not capable "to enjoy any office or place of trust either civil or military, or to have any grant of lands, tenements or hereditaments from the Crown to himself, or to any other or others in trust for him." Such a construction would involve so manifest a contradiction of s. 3, sub-s. 1, of the Act of 1914 that it could not possibly be maintained; so the appellant then argued that the words of s. 3 of the Act of Settlement from "or to enjoy" to "in trust for him" had been repealed by the Act of 1844 and had not been revived by the repeal of that Act. Lord Brougham's Act (13 & 14 Vict. c. 21), s. 5, provides that "where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions." It was contended that this enactment prevented the latter part of s. 3 of the Act of Settlement from being revived when the Act of 1844 was repealed. In my opinion this contention of the appellant is erroneous. The words of s. 3 of the Act of Settlement from "or to enjoy" to "in trust for him" have never been

repealed and still remain part of that Act. Lord Brougham's Act extends only to what is a true repeal. The provision in s. 1 of the Act of 1844 was not a true repeal. It is merely as if the Act of 1844 had enacted "Notwithstanding anything in the Act of Settlement contained." It shows that the Legislature had the provisions of the Act of Settlement before it and intended that the new enactment was to override the Act of Settlement where their provisions were in conflict. No part, however, of the Act of Settlement was absolutely repealed by the Act of 1844, and when that Act was repealed the Act of Settlement remained unrepealed and in full force, except so far as affected by the provisions in the new Act of 1870.

In my judgment the effect of s. 3, sub-s. 2, of the Act of 1914, which provides that s. 3 of the Act of Settlement shall have effect as if the words "naturalized or" were omitted therefrom, is not to qualify and restrict the effect of s. 3, sub-s. 1, nor to impose upon persons naturalized the disqualifications mentioned in s. 3 of the Act of Settlement or any of them, especially having regard to the fact that the language of s. 3, sub-s. 1, conferring rights upon naturalized persons is more extensive than the language of the Act of 1870, and concludes by providing that such a person shall "have to all intents and purposes the status of a natural-born British subject."

Moreover, the argument of the appellant gives no point or meaning to the omission of the words "naturalized or." The reading of the section for which he contends would be the same whether these words are in the section or not. Their omission makes no difference, according to him. A person having once been "born out of the kingdom" always remains in the condition of having been so born whether naturalized or not, and therefore, he says, comes within the language of s. 3 of the Act of Settlement, and the omission of the words "naturalized or" makes no difference in this respect.

In my judgment the appellant's argument as to the effect of s. 3 sub-s. 2, of the Act of 1914 wholly fails. The purpose and effect of that sub-section are to make it clear that, although the provisions of the Act of Settlement were no longer intended to apply to naturalized persons, they were nevertheless intended to remain in

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full force and effect and to continue to apply to persons made denizens by exercise of the prerogative of the Crown.

The appellant put forward as additional reasons why the provisions of the Act of Settlement were not repealed, either by the Act of 1870 or by s. 3, sub-s. 1, of the Act of 1914, (1.) that it was the rule never to imply the repeal of an earlier statute by a later one unless absolutely necessary to do so, by reason of the two being unable to stand together; and (2.) that no general words, however large, could impair the effect of particular words in prior enactments, and he insisted on the application of the maxim Generalia specialibus non derogant, and he urged that the judgment under appeal was arrived at only by disobeying these rules.

I am, however, of opinion that the provisions of s. 7 of the Act of 1870 cannot stand with the Act of Settlement, and that it is absolutely necessary to hold that, so far as they are inconsistent, the former must prevail. By the Act of 1870 an alien when naturalized is entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled. Political rights, powers, and privileges extend to and include the right of a person to take part in the government of the State in which he lives, and in its civil administration, and in the making and enforcement of its laws and in the preservation of law and order. "Political" in its wider sense includes these matters; in a narrower sense it relates to taking a side in politics in connection with a party system of government: see the word "political" in the Oxford English Dictionary. Eligibility for election to Parliament is one of the rights or privileges of a British subject. Aliens are incapable of sitting in Parliament by common law: see Anson, 4th ed., vol. 1, "Parliament," p. 80. Again, appointment to the Privy Council enables a person so appointed to take an active official part in the administration of the law. "The members of the Privy Council, like the judges of the High Court of Justice, are in the Commission of the Peace for every county": Anson, Law and Custom of the Constitution, 3rd ed., vol. 2, "The Crown," part I. at p. 140.

The second rule for construction of statutes on which the appellant relied, and which he contended had been infringed by the judgment under appeal, was thus stated by Lord Hatherley in *Garnett* v.

*Bradley* (1): "An Act directed towards a special object, or special class of objects, will not be repealed by a subsequent general Act embracing in its generality those particular objects, unless some reference be made directly or by necessary inference to the preceding special Act."

The Act of Settlement, in providing that a person born out of the kingdom, although naturalized, shall not be capable of being a member of the Privy Council or Parliament, or of enjoying certain offices, is in this respect directed towards a special object—the position and rights of a very limited class of persons; but the Naturalization Act of 1870 is also dealing with the same special object—the position and rights of the same limited class of persons. The Act of 1870, which repealed the Act of 1844, contains within itself the code which is in future to regulate and determine the rights and privileges of this limited class, and having regard to its language—to its reference to all political and other rights, powers, or privileges—it is a necessary inference that so much of the Act of Settlement as is in conflict with it was intended to be repealed. If the special object of s. 3 of the Act of Settlement was to prevent a limited class of persons from occupying certain positions, the expressed object of the Act of 1870 was to enable the same class of persons, or some of them, to fill those positions and exercise all other rights of natural-born subjects.

In my opinion the appeal fails and should be dismissed.

PHILLIMORE L.J. read the following judgment:—A rule nisi was obtained at the instance of Sir George Makgill calling upon Sir Edgar Speyer, Baronet, to show cause why an information in the nature of a quo warranto should not be exhibited against him to show by what authority he claimed to be a member of His Majesty's Most Honourable Privy Council.

Sir Edgar Speyer appeared to show cause, and the Attorney-General appeared on behalf of the Crown also to show cause and to contend that the place of a Privy Councillor was not one in respect of which an information in the nature of a quo warranto would lie.

After argument the King's Bench Division held that the remedy was applicable, but that the title of Sir Edgar Speyer to be a member

(1) (1878) 3 App. Cas. 944, 950

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of the Privy Council was a good one, and therefore discharged the rule. From this discharge Sir George Makgill has appealed. When the case came before us it was intimated by the Attorney-General that he desired, if opportunity offered, to renew his contention that the procedure was inapplicable, that is to say, that the place of a Privy Councillor was not one for which such an information would lie. We determined, however, to hear first the arguments on the point raised by the appellant; and inasmuch as we are of opinion that the decision of the King's Bench Division discharging the rule nisi was right upon the merits, it has become unnecessary for us to consider the question of procedure.

The main argument for the appellant turns upon the construction of a paragraph or portion of clause 3 of the Act of Settlement, which is in the following terms: "That after the said limitation shall take effect as aforesaid no person born out of the kingdoms of England, Scotland or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen except such as are born of English parents), shall be capable to be of the Privy Council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him" (12 & 13 Will. 3, c. 2). During the argument a question has arisen as to the operation of the proviso "except such as are born of English parents." Is it a proviso upon the words "no person born out of the kingdoms" or upon the words "although he be naturalized or made a denizen"? The learned judges in the Court below say that the effect of the Act of Settlement is that no person born out of the kingdoms or dominions shall have the four capacities unless, being born of English parents (note English, not British), he be also naturalized or made a denizen. It is for our purpose unnecessary to consider whether this view is the right one. All I will say is that I should require further consideration before I could assent to it. In this connection there is a passage in the judgment of the Lord Chief Justice in which the law seems too broadly stated. He says (1): "It was not until the British Nationality Act, 1730 (4 Geo. 2, c. 21), was passed that a child born abroad of a man who was by the common law a natural-

(1) [1916] 1 K. B. 614.

born British subject became himself a British-born subject, and this privilege was extended to grandchildren by the British Nationality Act, 1772 (13 Geo. 3, c. 21). Before the passing of these Acts the child or grandchild would in general have required to be naturalized to become a British subject: see *De Geer* v. *Stone* (1) and the recent case of *Rex* v. *Superintendent of Albany Street Police Station*." (2) This gives too little weight to the Act 25 Edw. 3, stat. 1, which enacts (if indeed it does not, as Hussey C.J. thought, declare) that "all children inheritors, which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid in time to come; so always, that the mothers of such children do pass the sea by the licence and wills of their husbands." There is no pretence for saying that the Act 25 Edw. 3, stat. 1, is not a true statute. The observation to the contrary is founded upon a confusion with a document on the Parliament Roll of 17 Edw. 3. It has been construed and applied in *Hyde* v. *Hill* (3) and in *Bacon* v. *Bacon* (4); and Lord Hale in *Collingwood* v. *Pace* (5), Kenyon C.J. and the other judges in *Doe* v. *Jones* (6), and Kay J. in *De Geer* v. *Stone* (7) treat it as authoritative. In the latter case Kay J. puts a limit upon its operation and rejects the somewhat fantastic contention of Bacon, S.-G., in *Calvin's Case* (8) that the right of the child remaining oversea was in turn transmissible to its child. It has now been repealed by the Act of 1914. But questions have arisen upon its construction. One learned author appears to have held that if either father or mother were English the right would pass to the child. Others have thought it necessary that both parents should be English. In *Bacon* v. *Bacon* (4) the fact that the father was English was held to be enough. The Act 7 Anne, c. 5, has been supposed to solve these questions in one way, and the Act of 4

(1) (1882) 22 Ch. D. 243.
(2) [1915] 3 K. B. 716.
(3) (1595) Cro. Eliz. 3.
(4) (1641) Cro. Car. 602.
(5) (1670) 1 Vent. 413.
(6) (1791) 4 T. R. 300, 308.
(7) 22 Ch. D. 252.
(8) (1668) 2 How. St. Tr. 575, 585.

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Geo. 2, c. 21, in another. The matter is discussed at length in *Doe* v. *Jones*. (1) It may be said that at any rate children born of fathers and mothers who at the time of their birth were " at the faith and ligeance of the King " were to be deemed English born. But these last words contemplate that the parents may have thrown off, or attempted to throw off, their faith and ligeance. Then their children will not be English born within the meaning of the statute of Edward (as it was decided in *Hyde* v. *Hill* (2) ).

Probably for some of these reasons Naturalization Acts were passed from time to time in favour of the children of British-born parents when these children had been born abroad. One of the most remarkable is the Act 29 Car. 2, c. 6, for naturalizing the children of Royalists who had left England during the Commonwealth. If the Lord Chief Justice had said that children born abroad were in fact often naturalized I should not have disagreed with him.

I return to the Act of Settlement. It will be observed that the Act is conditional and prospective, being only to come into operation if and when the House of Hanover succeeded to the Throne. It may be observed also that the disqualifying provision, so far as regards persons to be naturalized, is not very effective. Naturalization at this time, and till the passing of the Act of 1844, was by Act of Parliament, and the naturalizing Act could contain, if it was thought fit, a clause removing the four incapacities established by the Act of Settlement or any of them. Some provision against this was made by the statute 1 Geo. 1, stat. 2, c. 4, which enacted that no Bill of naturalization should be received unless it contained a clause disabling the person to be naturalized in respect of the four incapacities. Sometimes this fence was thrown down when persons of some importance were to be naturalized. A public Act was first passed to enable a private Bill to be brought in, without the disabling clause, and then a private Bill was brought in accordingly. This was done in the case of the Prince of Orange, who married the eldest daughter of George II. (7 Geo. 2, c. 3), and in the case of the Prince Consort (3 & 4 Vict. cc. 1 and 2). Several public Acts of Parliament naturalizing certain classes of well-deserving foreigners were passed before the Act of 1844, and the researches of counsel have enabled

(1) 4 T. R. 300. (2) Cro. Eliz. 3.

them to state that only in one case—that of the Act of 13 Geo. 3, c. 25—was there a clause removing the four incapacities.

In 1844 a new system of naturalization was provided. The Secretary of State was given power to issue a certificate of naturalization. The practice, however, of naturalization by private Bill has not altogether disappeared; indeed, there was an instance as late as the year 1911. By the joint effect of ss. 6 and 8 of the Act of 1844 (7 & 8 Vict. c. 66) any alien residing in any part of the United Kingdom with intent to settle therein might acquire a certificate of naturalization from the Secretary of State which might give and be expressed to give to him all the rights and capacities of a natural-born British subject, except the capacity of being a member of the Privy Council or a member of either House of Parliament. But the Secretary of State might except any particular right or capacity. Such a certificate therefore might, if the Secretary of State thought fit, remove two of the four incapacities besides giving all such rights as could, subject to the Act of George I., be bestowed by a private naturalization Act. Sect. 2 of the Act of 1844 repealed in terms the provisions of the last-mentioned Act of George I., the result being that thenceforward a Bill for a private Naturalization Act removing any or all of the four incapacities could be brought in. It follows that under the empire of the Act of 1844 an alien could obtain naturalization either with a removal of two of the four incapacities by certificate, or with a removal of all four by private Act. One other clause in this Act of 1844 must be mentioned, because it gave foundation to an argument on behalf of the appellant. By s. 1 "such parts of" certain recited Acts, one of them being the Act of Settlement, as are inconsistent with the provisions of this Act "shall be repealed." The next Act passed in this connection is the Naturalization Act, 1870 (33 & 34 Vict. c. 14). By this Act the Act of 1844 was repealed. By s. 7 the procedure of naturalization by certificate given by the Secretary of State was retained; but the conditions were different. Previous residence for not less than five years, or service under the Crown for not less than five years, and intention to reside in the United Kingdom, or to serve under the Crown, were made conditions precedent. The provision that a certificate might except any particular right or capacity was no longer to be found, nor the provision that the certificate may give

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all the rights and capacities of a natural-born British subject except the two of being a Privy Councillor or a member of either House. Instead there was the following provision: "An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, he deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect." Any one who had been naturalized before the Act might apply for and receive a certificate under this Act, a provision which seems to show that the new certificate would carry with it some greater benefits than the old one, though it might also create some disadvantage. By s. 13 nothing in the Act was to affect the grant of letters of denization.

Since this Act also (as has been already stated) private Naturalization Acts have from time to time been passed. One such was brought to our notice, and we were told that all the others which had been examined were in the same terms. This Act (48 & 49 Vict. c. ccvi.) (1) purports to give to the person naturalized all the rights, privileges, and capacities of a natural-born British subject. "Capacities" is said by counsel for the appellant to be the crucial enabling word. If so, it apparently occurs in all these Acts.

It was while the Act of 1870 was in force that Sir E. Speyer obtained his certificate of naturalization, and for the purpose of determining his status it is to this Act we must look, unless, indeed, any alteration in his status has (which is prima facie improbable) been made by the Act of 1914. I turn, therefore, to the construction of s. 7. Counsel for the appellant laid stress on the omission of the word "capacities," and said that neither "rights," "powers," nor "privileges" were apt words for conferring a capacity. No one, it was said, has a "right" to be a Privy Councillor or a member of either House. Nor is the capacity to become a Privy Councillor or a peer, if such should be the pleasure of the Crown, or to be elected a member of the Commons House (as it was contended), a "power"

(1) Apparently a private Act not printed.

or a "privilege." Be it observed that the qualifying adjectives are "political and other." The word "political" seems to me an apt adjective for the two capacities under discussion. I see no objection to describing the capacity to receive office or rank as a right, still less to describing it as a power or possibly a privilege. The language of the paragraph seems to me wide enough to comprise in its natural sense every advantage and disadvantage, every benefit and every liability, which a natural-born subject has. Whereas the certificate under the Act of 1844 might confer two of the four capacities or relieve from two of the four incapacities, or might be of a limited nature, the certificate under the Act of 1870 was to be general and unqualified in its terms. There is a further objection to the implying of any restriction or limitation of the apparently general provision of the Act. There is no reason to suppose that in the matter of the two other incapacities, those of holding offices of trust or receiving Crown grants of land, the Act intended to go back upon the policy of the Act of 1844. Indeed, past service of some kind under the Crown and intended future service under the Crown are to be regarded as qualifications for a certificate. But if the certificate under the Act of 1870 did not give the two other capacities, neither did it give these two. It is said that the Act of Settlement so far as it imposed these two incapacities had been repealed by the Act of 1844, and that Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21), s. 5, continued this repeal notwithstanding the repeal of the repealing Act. I think this is an error. The provision in Lord Brougham's Act is as follows: "Where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions." No actual part of the Act of Settlement was repealed by the Act of 1844. The provision still remained that an alien was subject to the four incapacities; he still was, though made a denizen; he still was, although naturalized, only that by the instrument of naturalization two of the incapacities might be removed. So much of the Act of Settlement as was inconsistent with this last provision was repealed for the purpose of letting in this provision. No words were cut out of the Act of Settlement. None could be. The repeal was not of a part, but of the particular operation of a part.

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It is a repeal quoad and for a purpose to let in the later Act, and with the repeal of the later Act the purpose of the qualified repeal disappears. Either a certificate of naturalization under the Act of 1870 removed all the four incapacities or it removed none of them. In my view it removed them all, and Sir E. Speyer was lawfully made a member of the Privy Council. What his position would be if he returned to the country of which he was a subject previously to obtaining his certificate it is not for me to say. We have no evidence that after he was sworn in of the Privy Council he has ever returned to Germany.

Counsel for the appellant strongly insisted upon two maxims which, it was said, had been unduly neglected in the Court below: that (1.) a repeal of a statute is not implied unless it is necessary, and (2.) Generalia specialibus non derogant. Both are useful guides to construction, but they must not be allowed to override plain words. The practice of repealing earlier enactments by express words has been by no means universally adopted in our legislation. The new law has often been left to have its own effect in abrogating the former law. Not unfrequently in the eighteenth and earlier part of the nineteenth century the new Act had in it the phrase "any law or statute notwithstanding." At one time in the reign of James I. the idea of purging the Statute-book seems to have occurred to Parliament. It did not, however, recur till the middle of the nineteenth century. If Parliament desired to put a class such as naturalized aliens in the same position as other subjects of the Crown, it would have a choice of two methods: it might either seek out, enumerate, and repeal in express terms every clause in every statute (some not improbably in statutes passed for the so-called protection of home trade), or it might in positive but general terms give the members of the class the full position of British subjects. It would be putting an improper constraint upon Parliament to exclude the latter from its competence.

Then as to the maxim Generalia specialibus non derogant, it is a little difficult to see which for the purspoes of the present case is the general and which the special enactment. The Act of Settlement excludes the general body of aliens from four particular capacities. The Naturalization Acts give to a particular class of aliens general capacity.

The last Act we have to consider is the Naturalization Act of 1914 (4 & 5 Geo. 5, c. 17). This Act by its schedule repeals the Act 25 Edw. 3, stat. 1, in part, and the words "naturalized or" in s. 3 of the Act of Settlement. It repeals also among other statutes the Act of 1870. The conditions for the grant of a certificate of naturalization are made somewhat stricter. By s. 3, sub-s. 1, "A person to whom a certificate of naturalization is granted . . . . shall, subject to the provisions of this Act, be entitled to all political and other rights powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject." The phrase "subject to the provisions of this Act" probably refers to s. 9. Words could not be wider than those in sub-s. 1 of s. 3. If any affirmative general words could remove particular disabilities these would. And as the certificate under this section will be more beneficial than one under the Act of 1870, for it omits the limiting words "shall in the United Kingdom be entitled" and the proviso that a naturalized alien shall when within the limits of his previous country not be a British subject, s. 6 enables an alien already naturalized to obtain a new certificate under the new Act. But it is contended that sub-s. 2 of s. 3 makes all the difference. It is in these words: "Section three of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words 'naturalized or' were omitted therefrom." Some reliance was placed on the words "which disqualifies," and it was suggested that the effect was to re-enact this portion of the Act of Settlement. I think the words "which disqualifies" are merely descriptive of the portion of the Act of Settlement to which reference is being made. Otherwise I think this sub-section is of no importance except as clearing the Statute-book of two words. Why this should be done twice over in this sub-section and again in the schedule I cannot say.

The effect is that the four incapacities remain for aliens although made denizens; but in the expurgated Act of Settlement there is no mention of naturalized aliens because they are dealt with by the appropriate Naturalization Act. It is unnecessary to add anything,

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as the construction of the Act of 1914 seems to me clear. But if the Act had made against the future capacity of persons in the position of Sir E. Speyer, I should be of opinion that his rights to be of the Privy Council would be saved by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. 2 (*c*), as "a right or privilege accrued" under a repealed statute.

For these reasons and for many of the reasons given by the learned judges in the Court below, but with the reservation I have already made as to some part of their judgments, I am of opinion that Sir E. Speyer was entitled to become and is entitled to be a member of the Privy Council, and that this appeal should be dismissed.

BANKES L.J. read the following judgment:—This is an appeal from a decision of the Divisional Court discharging a rule nisi calling upon the respondent, Sir Edgar Speyer, to show cause why an information in the nature of a quo warranto should not be exhibited against him to show by what authority he was or claimed to be a member of His Majesty's Privy Council for Great Britain.

The respondent was born outside the King's dominions of alien parents. He became a naturalized British subject in 1892 and was appointed a member of the Privy Council in 1909.

The appellant's counsel relied on two grounds in support of the appeal. The first and main ground was that s. 3 of the Act of Settlement is still in force so far as it relates to the disability of a naturalized alien to become a Privy Councillor. Whether this is so or not appears to me to depend entirely upon the question of whether this particular provision of s. 3 has or has not been impliedly repealed by s. 7 of the Naturalization Act of 1870. The material language of the two sections is as follows: Sect. 3 declares that "No person born out of the kingdoms of England, Scotland or Ireland, or the dominions thereto belonging (although he be naturalized or made a denizen, . . . . ), shall be capable to be of the Privy Council . . . . or to enjoy any office or place of trust." Sect. 7 of the Act of 1870 provides that "An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges . . . . to which

a natural-born British subject is entitled in the United Kingdom." The question which arises on these two sections is whether the capacity " to be of the Privy Council " is included in the expression " political and other rights, powers, and privileges " conferred upon an alien by the Act of 1870. I cannot doubt that it is. I see no reason for the suggestion that the qualification to be a Privy Councillor can only be expressed by the use of the word " capable " or " capacity " to be a Privy Councillor. The Act passed to explain the Act of Settlement (1 Geo. 1, stat. 2, c. 4) certainly did not so treat the matter, as s. 2 provides that in every Act of naturalization there must be a clause or particular words inserted to declare that the person referred to in the Act shall not thereby be " enabled " to be of the Privy Council. Nor can I see that any conclusion in favour of the appellant's contention should be drawn from the fact that in s. 7 of the Act of 1870 the expression " capacity " does not occur, as it does in s. 6 of the Act to amend the laws relating to aliens passed in the year 1844 (7 & 8 Vict. c. 66). This last-mentioned section contains an express exception in the language of the Act of Settlement of the incapacity of an alien to become of Her Majesty's Privy Council. It seems to me therefore only natural that the draftsman in framing the earlier part of the section dealing with the rights conferred upon an alien by the Act should have used the word " capacities " in order that the grant and the exception from the grant should fit in together. There was no such reason for the draftsman of the Act of 1870 adopting the precise language of the Act of Settlement. The Act of 1870 is a comprehensive Act the title of which is " An Act to amend the law relating to the legal condition of aliens and British subjects." Under the heading of " Status of Aliens in the United Kingdom " s. 2 deals with what in the side-note is called " Capacity of an alien as to property," and, after declaring that real and personal property of every description may be taken, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject, sub-s. 1 provides that the section shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise; and sub-s. 2 provides that the section shall not entitle an alien to any right or privilege as a British subject except such rights and privileges in respect of property as are by the

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section expressly given to him. Sect. 8, which deals with the case of a natural-born British subject who has become an alien under the Act and who is readmitted to British nationality, provides that upon readmission he shall resume his position as a British subject. From the language of these sections it seems to me clear that the Act treats the capacity to hold and deal with land, and the qualification for office or franchise, as a right or privilege, and that when s. 7 confers upon an alien to whom a certificate of naturalization is granted all political and other rights, powers, and privileges to which a natural-born British subject is entitled it expressly confers upon such an alien something which is expressed in the Act of Settlement as "the capacity to be of the Privy Council." If this is so, no reference need be made to the rules governing the interpretation of statutes, because it must be conceded that the two statutes cannot stand together, and to the extent to which the two are inconsistent the later statute must be taken to have impliedly repealed the earlier. Upon this interpretation of the Act of 1870 the Solicitor-General contends that the second ground relied on by the appellant does not arise, because the respondent having been made a Privy Councillor in the year 1909, whilst the Act of 1870 was still in force, he had acquired a right or privilege which was expressly preserved to him by s. 38, sub-s. 2 (*c*), of the Interpretation Act, 1889. This sub-section provides that where any Act passed after the commencement of that Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not affect any right or privilege acquired under the enactment repealed. If Mr. Powell's argument upon his second ground depended upon the repeal of the Act of 1870 by the British Nationality and Status of Aliens Act, 1914, I should agree with the Solicitor-General's contention, but I do not so understand Mr. Powell's argument. His contention is that the Act of 1914 not only repeals the Act of Settlement, but that it in terms reaffirms or re-enacts that part of s. 3 of the Act of Settlement which deals with the incapacity of a naturalized alien to become a Privy Councillor. In support of this argument Mr. Powell relies upon the language of sub-s. 2 of s. 3 of the Act of 1914. If it was possible to read this langauge literally there might be something to be said for Mr. Powell's point. Read literally the sub-section says that s. 3 of the Act of Settlement—that is to say, the whole of the

section—shall have effect—that is to say, shall operate—as if the words "naturalized or" were omitted therefrom. There seem to me to be many reasons why this is an impossible construction of the sub-section, but I need only refer to one. It was admitted by Mr. Powell that the effect of the Act of 1844 was to impliedly repeal so much of s. 3 of the Act of Settlement as imposed an incapacity upon an alien to enjoy offices or places of trust either civil or military. Sub-s. 1 of s. 3 of the Act of 1914 confers upon a naturalized alien not only political and other rights, powers, and privileges, but also to all intents and purposes the status of a natural-born British subject. These words must include the capacity to enjoy an office or place of trust. To revive the whole of s. 3 of the Act of Settlement would therefore be to enact something directly contrary to the express provisions of sub-s. 1 of s. 3 of the Act of 1914. If sub-s. 2 of that section is to be read at all in the sense contended for by Mr. Powell, it must therefore be qualified by inserting words restricting the operation of the sub-section to so much of s. 3 of the Act of Settlement as has not been already repealed by some previous Act, or is not impliedly repealed by this Act. Such a reading brings one back again to the point already discussed as to the meaning of the words "political and other rights, powers, and privileges" when used in the Act of 1870, because the same words are used in sub-s. 1 of s. 3 of the Act of 1914, except that the language of sub-s. 1 contains the significant additional words conferring the full status of a British-born subject, which is very much the expression used in s. 8 of the Act of 1870 when dealing with a natural British-born subject readmitted to British nationality. In face of these considerations I entertain no doubt that sub-s. 2 of s. 3 of the Act of 1914 cannot be read in the sense claimed for it by the argument of Mr. Powell. The object of the sub-section must in my opinion, having regard to the rest of the section, be exactly the opposite of that contended for by Mr. Powell. The language is not happily chosen, but the object must be to make it clear that the law as applicable to the position of a naturalized alien is to be found in the Act of 1914 and not in the Act of Settlement, and that the provisions of s. 3 of this last-mentioned section are, having regard to later legislation, to be read as confined to denizens only.

A number of points were referred to in the course of the argument

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with which I do not propose to deal, as they do not seem to me to be really material.

For the reasons I have given I think that this appeal fails.

*Appeal dismissed.*

Solicitors for appellant (relator): *Cree & Son.*

Solicitor for Clerk to the Privy Council and Home Secretary: *Treasury Solicitor.*

Solicitors for respondent Speyer: *Williamson, Hill & Co.*

W. J. B.

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## SPORTS AND GENERAL PRESS AGENCY, LIMITED *v.* "OUR DOGS" PUBLISHING COMPANY, LIMITED.

[1915 S. 2699.]

*Action, Cause of—Sole Right of taking Photographs.*

An exclusive right to take photographs does not, in law, exist as property.

The promoters of a dog show purported to assign the sole photographic rights in connection with the show. The assignee purported to assign to the plaintiffs the sole Press photographic rights at the show. The defendants by an agent took photographs of the show although previously informed that the promoters had assigned the exclusive right to do so. The promoters of the show did not cause any notice to be placed on the tickets of admission or otherwise forbid the taking of photographs at the show. The defendants having published in an illustrated journal the photographs they had taken, the plaintiffs brought an action for an injunction to restrain them from continuing to do so:—

*Held*, that the action would not lie, inasmuch as the promoters of the dog show had, in law, no exclusive right of photographing anything there, and therefore could not assign that right as property. Their possession of the land on which the show was held would have entitled them to make their purported assignment effective by making conditions as to admission and stipulating that no one should enter unless he agreed not to take any photographs, but they had not done so, and therefore the plaintiffs had failed to make out any cause of action.

ACTION tried before Horridge J. without a jury.

The action was brought for (inter alia) an injunction restraining the defendants from publishing in their publication called *Our Dogs*

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or any other publication any photographs taken at the Ladies' Kennel Association Show other than photographs taken by the plaintiffs. The plaintiffs, the Sports and General Press Agency, Limited, were a publishing company carrying on business in London, and the defendants, who carried on business in Manchester, were the publishers and proprietors of *Our Dogs*, a weekly illustrated journal devoted solely to dogs. In March, 1915, one Thomas Fall, a photographer carrying on business in Baker Street, London, by a contract contained in correspondence between him and the secretary of the Ladies' Kennel Association, bought from the association "the sole photographic rights in connection with" a dog show organized by the association and held at the Botanical Gardens on June 9, 1915. Fall subsequently wrote to the plaintiffs offering to sell to them "the sole Press rights" at the association show. The plaintiffs by letter accepted that offer, and the learned judge found that they represented Fall so far as the Press (including Press photographic) rights were concerned which he had obtained. The plaintiffs' case was that they became entitled to the sole right of reproducing or procuring to be reproduced any photographs taken by Fall or his agents of the show and of selling them for publication to the exclusion of any other person, including the defendants. They complained that, although the defendants were well aware of their and Fall's exclusive rights, they, in violation thereof, by their agent, one Baskerville, although previously warned and requested not so to do, took a number of photographs of the show at the Botanical Gardens on June 9, 1915, some or all of which they caused to be reproduced in their issue of *Our Dogs* of June 18, 1915. The defendants did not dispute the fact that Baskerville took the photographs nor the publication in *Our Dogs* of them, and the learned judge found as a fact that Baskerville took the photographs as the defendants' agent, and that when he brought the photographs to the defendants their manager was aware of the fact that on previous occasions the plaintiffs had made complaints about Baskerville; that the defendants knew that on this occasion the association had purported to make over the exclusive right of taking photographs at the show; and that when Baskerville took the photographs he knew he was infringing the rights of some one. The defence was in substance that the Ladies' Kennel Association had,

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in law, no right of property in the taking of photographs of their show, and therefore no power to sell the sole right of taking photographs of the dog show, and that consequently neither Fall nor the plaintiffs had any legal right to complain of the fact that the defendants had published photographs taken at the show. The secretary of the Ladies' Kennel Association gave evidence to the effect that at the show on June 9 Baskerville asked her if he might take photographs and she referred him to Fall, who, she told him, had the sole photographic right. Her instructions were that no one but Fall should be allowed to take photographs in the show, but there was no notice on the tickets of admission or otherwise forbidding the bringing of cameras into the show or the taking of photographs there.

*Hemmerde, K.C.* and *N. L. Macaskie*, for the plaintiffs. The plaintiffs have a cause of action against the defendants. A contract existed between the Ladies' Kennel Association and Fall under which the association gave him the exclusive right for value to take photographs of the show, and if the association broke the contract Fall would have a right of action against them: *Hurst* v. *Picture Theatres* (1); *Exchange Telegraph Co.* v. *Gregory & Co.* (2); *Exchange Telegraph Co.* v. *Central News* (3); *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (4); *Cox* v. *Coulson.* (5) The association gave rights to Fall which are the subject of copyright. Fall was entitled to assign the whole or part of his rights to the plaintiffs. The effect of the contract between the association and Fall was that they granted to Fall an irrevocable licence which was assignable by him: *Muskett* v. *Hill.* (6) Fall's licensee or assignee has a cause of action against a stranger who infringes the rights so created: *Whaley* v. *Laing.* (7)

*Holman Gregory, K.C.*, and *W. M. Freeman*, for the defendants. The plaintiffs have made out no case. They have not proved any title to any photographic rights. The true position of the plaintiffs was that they had the right to exclude persons from the show. They could admit a person and confer upon him a right to take

(1) [1915] 1 K. B. 1.
(2) [1896] 1 Q. B. 147.
(3) [1897] 2 Ch. 48.
(4) [1908] 1 Ch. 335.
(5) Ante, p. 177.
(6) (1839) 5 Bing. N. C. 694.
(7) (1857) 2 H. & N. 476; (1858) 3 H. & N. 675.

photographs, or they could admit him subject to a condition that he was not to take photographs. But they have no exclusive right, in the nature of a right in rem, to take photographs, and no right to restrain persons from taking them. They have no property or copyright in the exhibits at the show.

*Hemmerde, K.C.*, in reply. Persons admitted to the show had no more right to take photographs than a person admitted to a theatre has to sell chocolates. The Ladies' Kennel Association have the exclusive right of taking photographs within their own enclosure, and that right was transferred to the plaintiffs. The association had the exclusive right of occupation of the land for a day and of using it for any purpose they pleased subject to the rights of other persons, and they could sublet their rights. The right to photograph is included in the right of user of the land.

HORRIDGE J., having stated the facts, continued: If Fall acquired any right of property I think this right would come within the language of Lord Esher M.R. in *Exchange Telegraph Co.* v. *Gregory & Co.* (1): "It is property, and being sold to the plaintiffs it was their property. The defendant has, with intention, invaded their right of property in it. . . . ." If the plaintiffs acquired any right of property, that passage, in my view, shows that they have a cause of action entitling me to grant an injunction against the defendants. It therefore becomes necessary to consider the position in which the Ladies' Kennel Association stood. They had taken the site of this show for the day on which it was held. They were entitled, upon the evidence before me, to the exclusive possession of those premises for the day. That possession enabled them to make conditions upon which they would admit persons to the premises, and they could, if they had chosen, have made a condition that no person except Fall should have the right to enter the premises except upon the condition that he agreed not to photograph. But the association did not do that. They purported to grant to Fall the exclusive right to take photographs, and that could only have been made operative by their seeing that nobody else had the chance of photographing upon the land of which they were for that day in sole possession. In my view they had no right to photograph as distinguished from

(1) [1896] 1 Q. B. 153.

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the rights of other persons. It is quite true that, as they were in possession of the spot where it would probably be convenient to place the camera for the purpose of photographing, they had the advantage, so far as the land in their possession was concerned, of being the only persons who could conveniently take photographs, but that is a very different thing from saying that they had the sole right to photograph anything inside the show. If any person were to be in a position, for example from the top of a house, to photograph the show from outside it, the association would have had no right to stop him. In my judgment no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him, provided the description is not libellous or otherwise wrongful. Those rights do not exist. As, therefore, the Ladies' Kennel Association had no exclusive right to take photographs—as distinguished from their means of obtaining the right by virtue of their possession of the land—I do not think they could grant, as property, the exclusive photographic rights as they purported to do by their agreement with Fall.

In my view, therefore, the plaintiffs have no right of property which the defendants have knowingly infringed, and this action fails and must be dismissed with costs.

*Judgment for defendants.*

Solicitor for plaintiffs : *Alfred Allistone.*

Solicitors for defendants : *Woodcock, Ryland & Parker, for W. M. Whitehead, Manchester.*

J. E. A.

[IN THE COURT OF APPEAL.]

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*June* 21, 22; *July* 10.

## CROSSFIELD & CO. *v.* KYLE SHIPPING COMPANY, LIMITED.

[1914 C. 985.]

*Ship—Charterparty—Bill of Lading conclusive Evidence of "quantity delivered to ship as stated therein"—Estoppel.*

The sellers of timber in New Brunswick chartered the defendants' ship for the carriage of a cargo of timber to Manchester. The charterparty provided that "all responsibility of charterers hereunder ceases as soon as the cargo is alongside . . . . Captain or agent to sign bills of lading as per surveyors' return for the cargo . . . . Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The charterparty contained an exception of perils of the sea. The timber was brought down to the ship on lighters, and through rough weather a portion of it was washed overboard from the lighters and lost. The captain's agent signed bills of lading for the timber, in which the full quantity as per surveyors' return was described as "shipped on board." All the timber actually placed on board was delivered at Manchester. The plaintiffs, who were the indorsees of the bills of lading, sued the defendants for short delivery:—

*Held*, that the bills of lading estopped the defendants from denying that the full amount of cargo stated therein was shipped.

*Lishman* v. *Christie* (1887) 19 Q. B. D. 333 approved and followed.

Judgment of Bailhache J. affirmed.

Appeal of the defendants from the judgment of Bailhache J.

The facts showed that by a written contract of April 11, 1913, the plaintiffs, who were timber merchants carrying on business at Barrow-in-Furness, agreed to purchase of J. Nelson Smith, of St. John's, New Brunswick, a cargo of timber. The timber was to be shipped on c.i.f. conditions at Grindstone Island, New Brunswick, and carried to Manchester. On May 28, 1913, J. Nelson Smith chartered the steamship *Kylestrome*, belonging to the defendants, for the carriage of the cargo. By the charterparty it was agreed that the *Kylestrome* should with all convenient speed proceed to Grindstone Island and there load a cargo of timber and should forthwith proceed to certain named ports as ordered on signing bills of lading; Manchester was one of the ports named. The following

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clauses of the charterparty are material: "2. Freight payable on measurement of quantity delivered as and when ascertained at the port of discharge . . . . All responsibility whatsoever of the charterers hereunder ceases as soon as the cargo is alongside. 3. The act of God, perils of the sea, &c., always mutually excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowners. 12. The usual custom of the wood trade of each port is to be observed by each party on customary terms. 13. The captain or agent to sign bills of lading as per surveyors' return for the cargo and, if required, for separate parcels, and deliver accordingly. 14. Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein. The captain's or agent's signature to be accepted in all cases as binding on owner."

The *Kylestrome* arrived at Grindstone Island on June 28, 1913, and loading commenced on June 30 and was carried on from lighters. The bills of lading were signed by the captain's agent; they acknowledged that the timber was "shipped in good order and well-conditioned by J. Nelson Smith, in accordance with the charterparty of May 28, 1913, the terms, conditions, and exceptions contained therein being incorporated and forming part of the bills of lading." On the arrival of the *Kylestrome* at Manchester it was found that the cargo was short of the quantity mentioned in the bills of lading by eighty-five standards. It was admitted that all the cargo actually placed on board the ship was duly discharged at Manchester.

The plaintiffs sued the defendants for non-delivery of part of the cargo and claimed 588*l.* 4*s.* 11*d.* as damages. The defendants alleged in their defence that the timber was lost whilst it was alongside the *Kylestrome;* that the loss was due to perils of the sea; and that under the exception clause in the charterparty the shipowners were relieved of all responsibility.

It did not clearly appear how so large a quantity of timber came to be lost. There was an entry in the log on June 30, "A nasty, choppy sea, causing lighters to roll, and losing a quantity of timber overboard," and in the master's protest of July 15 it was stated that "on the 30 June commenced taking in a cargo of lumber, and in consequence of the lighters striking against the sides of the ship, and

from the strong winds and choppy seas and exceptionally strong current, a quantity of lumber in being transferred from the said lighters to the said ship was washed overboard and lost, and every effort was made to recover same, and a quantity was bruised, broken and split, and due care, diligence and skill were observed in transferring the said lumber from the said lighters to the said ship."

The cargo for the steamship was brought down from the interior and was loaded into lighters at Grindstone Island and was checked and tallied into the lighters by licensed and sworn surveyors, whose measurements were conclusive as between the sellers and buyers; there was no further checking or tallying when the timber was brought alongside for shipment. The master signed the bills of lading for the figures arrived at by the surveyors, stating the whole quantity to be "shipped on board."

Bailhache J. held that the case was governed by *Lishman* v. *Christie* (1) and gave judgment for the plaintiffs. The defendants appealed.

*Adair Roche*, *K.C.*, and *R. A. Wright*, for the defendants. Bailhache J. was wrong in following *Lishman* v. *Christie* (1) instead of *Pyman* v. *Burt*. (2) The defendants are not estopped by the terms of the bills of lading from showing that the full amount of cargo stated therein was not actually shipped on voard. Clause 14 of the charterparty only means that the bills of lading are to be conclusive evidence of the quantity delivered to ship; so that if, in accordance with the contract, delivery of timber by the shipper alongside the ship in lighters, or floating in the water, is delivery to the shipowner, the bill of lading is only conclusive evidence of such delivery. The documents in *Lishman* v. *Christie* (1) were very different from those in the present case. It cannot be successfully contended that the owners were bound to sign the bills of lading by their agent, but were not protected by the exceptions. [They also referred to *Fisher, Renwick & Co.* v. *Calder & Co.* (3)]

*MacKinnon*, *K.C.*, and *Jowitt*, for the plaintiffs. It is not necessary to look at the contract of sale; the contract of shipment contained in the bills of lading should alone be looked at. In an

(1) 19 Q. B. D. 333. (2) (1884) Cab. & E. 207.
(3) (1896) 1 Com. Cas. 456.

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ordinary case *Grant* v. *Norway* (1) shows that the captain has no authority from the owners to sign for more goods than were actually on board. But here there is an express clause in the charterparty that the bill of lading shall be conclusive evidence of the amount of timber shipped. It is a question not of custom, but of contract. The shipowners have agreed to accept the return of the surveyors as to the amount of cargo and to sign bills of lading for that amount. The captain might have made a reservation in the bills of lading, but he has not done so. To rely upon the difference between the expressions "delivered to the ship" and "received" is to introduce an unnecessary subtlety into the construction of the clause. It is for the shipowner to prove that the cargo which he admits having received was lost by excepted perils, and there has been no attempt to do so. *Lishman* v. *Christie* (2) is practically indistinguishable and is decisive of the case. [They also referred to *Lohden & Co.* v. *Calder & Co.* (3); *Mediterranean and New York Steamship Co.* v. *Mackay.* (4)]

*R. A. Wright* in reply. The Court should act on the assumption that the missing portion of the cargo was lost during loading; that being so, the defendants have proved that all that they received was delivered by them. "Delivered to the ship," the expression used in clause 14 of the charterparty, is very different from "shipped on board," as used in the bill of lading. The expression "as stated therein" in clause 14 of the charterparty is to be construed with reference to quantities, and not with reference to delivery to ship or to the words "shipped on board" in the bill of lading. The quantity of goods that can properly be put into the invoice under the contract of sale is the quantity delivered on board ship. The case is distinguishable from *Lishman* v. *Christie* (2) and is on the same lines as *Pyman* v. *Burt.* (5) [He also referred to *Brenda Steamship Co.* v. *Green.* (6)]

*Cur. adv. vult.*

July 10. SWINFEN EADY L.J. read the following judgment:— The plaintiffs in this action, as indorsees of a bill of lading for a

(1) (1851) 10 C. B. 665.
(2) 19 Q. B. D. 333.
(3) (1898) 14 Times L. R. 311.
(4) [1903] 1 K. B. 297.
(5) Cab. & E. 207.
(6) [1900] 1 Q. B. 518.

timber cargo, sued the defendants, who are the owners of the ship *Kylestrome*, upon which the cargo was loaded, for short delivery. The judge found for the plaintiffs for 588*l.* 4*s.* 11*d.*, and against this judgment the defendants appeal.

The shipment was from New Brunswick to Manchester. It is not now disputed that the quantity of timber delivered from the ship at Manchester was eighty-five standards, of the value of 588*l.* 4*s.* 11*d.*, less than the quantity stated in the bills of lading to have been shipped on board ; nor, on the other hand, is it disputed that all the cargo which was actually placed on board the ship was duly discharged at Manchester. The uprights and surface of this deck-load timber had been marked with paint at regular intervals, and the stowage was regular and unbroken throughout and on arrival at Manchester showed no signs of any cargo having been lost. How so large a quantity of timber as eighty-five standards came to be lost does not clearly appear. The loading of the ship commenced on June 30 and was not completed until about July 16, and it is only on one day that any loss from weather is definitely stated to have occurred. In the log under date June 30 there is an entry " A nasty, choppy sea, causing lighters to roll, and losing a quantity of timber overboard," and in the master's protest of July 15 he states that on June 30 he commenced taking in a cargo of lumber, and in consequence of the lighters " striking against the sides of the ship, and from the strong winds and choppy seas and exceptionally strong current, a quantity of lumber in being transferred from the said lighters to the said ship was washed overboard and lost, and every effort was made to recover same, and a quantity was bruised, broken, and split, and that due care, diligence and skill were observed in transferring the said lumber from the said lighters to the said ship." No further details of the loss are given. It appears that the cargo for the steamship was brought down from the interior and was loaded into lighters at Grindstone Island and was checked and tallied into the lighters by licensed and sworn surveyors, and that such measurements are conclusive as between the sellers and buyers ; upon these figures the timber is invoiced and the buyer pays. There is no further checking or tallying when the timber is brought alongside for shipment. It would probably be impracticable, except at very considerable expense, as the original entries with details of the

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lumber loaded into lighters occupied seventy sheets. The master signs the bills of lading for the figures arrived at by the surveyors, stating the whole quantity to be shipped on board.

The defendants contend that they are not estopped and precluded by the terms of the bill of lading (which incorporates the material provisions of the charterparty) from showing that the full amount of cargo stated therein was not actually shipped on board. If the defendants are entitled to show that a smaller quantity than that mentioned in the bill of lading was all that was really shipped on board, then it was doubtless proved as a fact that such was the case.

The bill of lading, dated July 16, 1913, is as follows: "Shipped in good order and well-conditioned by J. Nelson Smith on board the s.s. *Kylestrome*, whereof David Muir is master, now lying in the port of Harvey, New Brunswick, and bound for Manchester, England . . . ."—then follows a detailed specification of 177,281 pieces of wood, containing in the whole 3,170,555 superficial feet—"being marked and numbered as in the margin, and are to be delivered in like good order and condition at the port of Manchester, England, unto Messrs. Price & Pierce, Limited, or to their assigns, he or they paying freight for the said goods in accordance with charterparty dated May 28, 1913. All the terms, conditions and exceptions (including negligence clause) contained in which are herewith incorporated and form part hereof." Clause 2 of the charterparty is as follows: [His Lordship read the clause.] Clauses 12, 13, and 14 run thus: [His Lordship read them.]

Having regard to the terms of this charterparty, and especially to clause 14, the plaintiffs contend that the defendants have bound themselves by contract to treat the bills of lading as conclusive evidence of the quantity delivered to the ship *as stated therein*—that is, as they contend, of the quantity "shipped on board"—and cannot now question the amount. A bill of lading is, generally speaking, prima facie evidence against the shipowner of the shipment on board of the quantity of goods thereby acknowledged by him to have been so shipped, but it is not conclusive; the parties, however, may by contract agree to make it conclusive evidence, and the question here is whether that is the true effect of the clause in the charterparty incorporated in the bill of lading.

If the true meaning of clause 14 is that the bill of lading is to be

conclusive evidence against the owners that the quantity stated therein as having been "shipped . . . . on board" has in fact been actually shipped and placed on board, then the appeal cannot succeed; there was the short delivery of eighty-five standards, and it is not suggested that any lumber actually shipped on board was subsequently lost by any excepted peril. The defendants, however, contend that clause 14 only means that the bill of lading is to be conclusive evidence of the quantity "delivered to ship"; that if in accordance with the contract delivery of lumber by the shipper alongside the ship in lighters or floating in the water is delivery to the shipowner, so that his responsibility for cargo then commences and his lien for freight then attaches, the bill of lading is only conclusive evidence of *such* delivery; that the words "as stated therein" refer only to *quantity* as stated in the bill of lading; and that the words "as stated therein" do not refer to and make conclusive the statement in the bill of lading "shipped . . . . on board."

It must be assumed that the parties to the charterparty contemplated that the bill of lading would be in the form in common use in the timber trade at the port of loading, which states the quantity of timber mentioned therein as having been "shipped on board," which can only mean actually shipped on board. What is the object of such a provision in a charterparty? This question was put and answered by Lord Esher M.R. in *Lishman* v. *Christie*. (1) He said: "What can be the meaning of such a provision but to get rid of the liberty of the shipowners to shew that the quantity stated to have been shipped was not really put on board and to make the bill of lading an estoppel? The provision is a good business provision for the purpose of avoiding disputes as to quantity shipped where there is no dishonesty on either side." In that case it was provided by the charterparty that the bills of lading should be conclusive evidence against the owners of the quantity of cargo "received as stated therein." Here it is "delivered to ship as stated therein." I see no distinction between "delivered to ship" and "received by ship." They both describe the same transaction looked at from opposite points of view. Lord Esher M.R. said (1): "The provision is that the bill of lading is to be conclusive evidence of the quantity of cargo received as stated therein. How is any quantity stated

(1) 19 Q. B. D. 333, 338.

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to have been received by a bill of lading? By the word 'shipped' of course." In that case the express terms of the contract required the cargo which was to be carried to be brought alongside the ship at merchants' risk and expense, and excluded the custom of the port of Memel, by which the captains of ships took delivery of timber to be shipped at ponds a mile and a half away, the timber being subsequently rafted down to the ships; and it was urged that the captain had exceeded his authority in signing bills of lading with regard to goods for which the mate gave receipts a mile or more away, and which had been lost in rafting down. But, assuming that the shipowner was bound by the bills of lading (as the Court held he was), the further question arose as to the meaning of the words "received as therein stated"; indeed the same point was open in that case as is raised here; that "received" did not mean more than received by the ship and did not extend to shipped on board as stated in the bill of lading, and accordingly, as the owners were held liable for goods received by the mate at the timber ponds, that the owner ought to be allowed to prove loss by an excepted peril in process of loading while being rafted down the river. It was, however, determined that the object of the clause as to conclusive evidence was to prevent that very kind of dispute and to make the statement in the bill of lading as to shipment on board an absolute estoppel against the shipowner. As Lindley L.J. said, "The shipowner has agreed to be bound by the statement in the bill of lading, and by that he must stand or fall." *Fisher, Renwick & Co.* v. *Calder & Co.* (1) is to the same effect. In that case, tried before Mathew J., timber had been brought alongside the vessel to be shipped therein, and was then delivered into the custody of those in charge of the vessel, by whom it was properly secured alongside her by booms and ropes. Subsequently by reason of violent weather a quantity of that timber was lost before it could be actually shipped on board. The master signed bills of lading for the whole quantity brought alongside, without deducting so much as had never been actually shipped on board. In an action by the consignees against the shipowners for the value of the timber so lost it was held that the plaintiffs were entitled to recover. Mathew J. said: "In the shipment of timber cargoes troublesome questions frequently

(1) 1 Com. Cas. 456.

arise as to whether timber, which is found at the time of delivery to be missing, was lost before or after shipment. With a view to disposing of all such questions, the clause in this charterparty provides that the bills of lading shall be conclusive evidence against the owners of the quantity of cargo shipped on board as stated therein. What is contemplated is that the bills of lading should pass from hand to hand, and that the consignee should have by the acknowledgment therein conclusive evidence of the quantity shipped. In this particular case the shipowners have sought to show that the timber in question was lost by reason of the excepted perils. But I must give effect to the words of the contract. These goods never were shipped, and therefore the exception of the specified perils did not operate."

*Pyman* v. *Burt* (1) cannot be considered an authority to the contrary, as the case was decided upon the ground that the special circumstances were such as to prevent the conclusive evidence clause in the charterparty from being held binding.

I am of opinion that no encouragement should be given to a practice of signing clean bills of lading for goods which the master knows have not been put on board, and with the intention that the actual shipment shall be subsequently disputed. In the 7th edition of Scrutton on Charterparties (1914) the learned author states (at p. 58) that recently shipowners have met the difficulty by adding to the statement of cargo shipped in the bill of lading a marginal note "so many timbers of above lost alongside," or similar words, which seems to make the bill of lading contain no conclusive statement of quantity shipped. It was so treated by Bigham J. in *Lohden & Co.* v. *Calder & Co.* (2) The bill of lading there stated that the full quantity of whole sleepers and half-sleepers had been shipped on board, but a note was put in the margin in these words: "Hereof, about 1000 half pieces, and about 400 whole pieces, lost through weather as per protest dated Riga, 5-17 Nov. 1897." In that case it was held that there was no estoppel (although the charterparty contained a conclusive evidence clause), as the bill of lading did not amount to such a clear statement of the quantity taken on board as to justify the Court in holding that the owners of the ship were precluded from showing that part of the goods were not shipped on board the vessel.

(1) Cab. & E. 207. (2) 14 Times L. R. 311.

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In my opinion the effect of the conclusive evidence clause was settled by *Lishman* v. *Christie* (1) nearly thirty years ago, and a method has since been pointed out by which, by means of a note in the margin of a bill of lading, shipowners can protect themselves if cargo is known to be lost before actual shipment on board, and it would only unsettle the law if fine distinctions were now to be drawn depending upon slight verbal differences in the language of the conclusive evidence clause.

In my judgment the appeal fails and should be dismissed.

PHILLIMORE L.J. read the following judgment:—The plaintiffs in this case, being the receivers of a cargo of timber delivered at the port of Manchester, sought for and have obtained judgment against the defendants, the shipowners, for short delivery. Hence this appeal.

There is no doubt that upon its final ascertainment it was settled that the cargo was about eighty-five standards short of the total quantity entered upon the bill of lading. On the other hand it is not disputed that the ship brought all the cargo which she actually took on board. No other explanations of the discrepancy are offered, except that the bill of lading follows (as it should do) the surveyor's return at the port of shipment, and that either the surveyor made some serious miscalculation or the cargo was lost after it had been brought by schooners or scows from various places further inland to the place where the ship was lying and had been finally checked by the surveyor. There was a statement in the log and protest which would account for some of it having been so lost. It is not very probable that the statement would cover so large a loss; but, having regard to the letter of the plaintiffs' solicitors of February 11, 1914, and other matters, I am of opinion that it was intended to try this action upon the supposition that the missing cargo had been lost during the loading operations, and, if so, by perils of the seas. The bill of lading incorporates all the terms, conditions, and exceptions of the charterparty; and by the terms of the latter all responsibility of the charterer ceases "as soon as the cargo is alongside" (clause 2). Certain perils are excepted (clause 3). The usual custom of the wood trade of each port is to be observed

(1) 19 Q. B. D. 333.

(clause 12). The captain is to sign bills of lading as per surveyor's return (clause 13). And the "bills of lading shall be conclusive evidence against the shipowners as establishing the quantity delivered to the ship as stated therein. The captain's . . . . signature to be accepted in all cases as binding on owners" (clause 14).

The defences raised for the shipowners are: (1.) That if the bill of lading is to be construed as meaning that the quantities mentioned had been actually taken on board, the statement therein is not a statement "establishing the quantity delivered to the ship as stated therein" within the meaning of clause 14 of the charterparty, and is therefore a simple statement by the master which, though prima facie evidence against the shipowners, is rebuttable and was rebutted. (2.) That if on the other hand the bill of lading means that the quantities had been delivered into the possession of the master so that the shipper's risk was ended and that of the shipowner had begun, then the loss was subsequent and was due to a peril excepted by the bill of lading, to wit, perils of the seas.

For the second question, which I propose to take first, it is necessary to ascertain at what period of the adventure the risk of the shippers ended and that of the shipowners began. For some time I was of opinion that the risk of the shipowners began at a period anterior to the actual shipment, and indeed I think that in the argument there was almost an agreement between the two parties as to this, except that counsel for the shippers would date back the dividing period even further than the shipowners need for the purposes of their defence. In the case of *Lishman* v. *Christie* (1), decided in this Court, and in some cases in Courts of first instance, the dividing period was that which is usual in cases of shipment. The cargo had to be brought alongside at merchant's risk and expense, "alongside" meaning in ordinary cases by and level with the ship's rail, but very likely, in shipments of timber or other bulky materials which must be raised by the ship's gear, within reach of the ship's tackles. In these cases the short period of time spent in the act of shipping is not treated as a separate period, and the master signs, or should sign, for goods so brought level with the rail or in appropriate cases within reach of the ship's tackles as "shipped on board."

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Counsel for the shipowners contended that the effect of clause 13 that the captain was to sign bills of lading as per surveyor's return, coupled with the practice by which the final surveyor's return was merely an arithmetical result of the several returns made by the surveyors who measured the timber as it was put upon the several lighters up country, made the shipowners responsible at least for the totals of cargo put on board the lighters which arrived at the ship without apparent loss by the way, and counsel for the shippers (as I understood the argument) antedated this liability to the times of the original shipments up country. If either of these contentions were correct I should think that whenever the shipowners' liability began the excepted perils also attached. Otherwise there would be two contracts by the shipowners, one of ordinary bailment and another for carriage upon the terms of the bill of lading. But upon reflection I do not think that either of these contentions is correct. The clause by which the charterers' responsibility ceases as soon as the cargo is alongside, though in form a cesser clause, sufficiently shows what is intended. There is no reason for giving "alongside" any other meaning than the usual one, which was that given to it in *Lishman* v. *Christie*. (1)

The clause requiring the captain to sign bills of lading as per surveyor's return must be given a reasonable construction. By it the captain may be precluded from questioning the measurements of the original surveyors or the arithmetic of the final surveyor. But he is not compelled to sign bills of lading according to a return which neglects such an occurrence as the non-arrival of a lighter or its arrival with half its cargo. Nor is he compelled to sign clean bills of lading if after the arrival of the lighters he knows that portions of the cargo have got adrift before they were actually brought on board. He can either insist upon the proper deductions being made, or he can (as has been done in other cases) sign for the quantities specified in the final return with a note that so many pieces of such and such a description were lost or are short. If there is a dispute, the matter must be settled by arbitration as provided by clause 16 of the charterparty. If this be so, then the present case is on all fours with *Lishman* v. *Christie*. (1) In this case as in that the master was not bound to sign bills of lading which admitted

(1) 19 Q. B. D. 333.

without qualification that the sum of the quantities of timber collected up country had been shipped on board. Having, however, so signed, and the conclusive evidence clause being in the charterparty, his owners were precluded from contesting the quantity and could not rely upon an excepted peril, as no such peril had occurred after shipment.

I should say a word on the phrase in the charterparty " as stated herein." I think that the meaning is that the bill of lading is to be conclusive evidence establishing not only the quantity delivered to the ship, but also that the total quantity is made up according to the details stated therein—that is to say, that there are so many " pieces," so many " deals and battens " containing so many cubic feet, so much " scantling," so many " deal ends " and " boards "—and thus conclude the shipowners from raising or successfully raising the point raised in *Mediterranean and New York Steamship Co.* v. *Mackay*. (1) Therefore I think that these words do not help the shippers. But for the reasons already given the second point taken for the defence fails.

As to the first point taken for the defence, that if the words " shipped on board " are to be given their precise meaning then the master had no authority within the conclusive evidence clause to make this admission, but had only authority to sign for what was delivered to the ship ; if delivery and receipt are correlative terms, and if receipt is by shipment, then the master has by signing the bill of lading established the quantity delivered to the ship, and this is what he had authority to do. I think, therefore, that the appeal fails.

BANKES L.J. read the following judgment :—This is an action in which the plaintiffs claimed as indorsees of a bill of lading for damages for short delivery of a quantity of timber. The bill of lading incorporated all the terms, conditions, and exceptions of a charterparty, and the main contest between the parties was whether by the terms of the charterparty the bill of lading was made conclusive evidence against the shipowners in regard to the quantity of timber short delivered at the port of discharge. Bailhache J. decided against the defendants, the shipowners, upon the ground that he considered

(1) [1903] 1 K. B. 297.

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the case was covered by the decision of this Court in *Lishman* v. *Christie*. (1)

The facts of the case lie in a small compass. On April 11, 1913, the plaintiffs entered into a contract with J. Nelson Smith for the purchase from him of a cargo of timber upon c.i.f. terms. The goods were deliverable to the vessel at Grindstone Island, N.B., agreeably to the customs of the port. The contract contained a provision that the seller was not responsible for any deterioration of quality or condition after the goods had been sent alongside the vessel. The provisions as to payment contained the following terms: "the freight is to be deducted from invoice on foreign measure and paid by buyers as per usual charterparty and/or liner bill of lading which they hereby agree to adopt, remainder by approved acceptance of sellers, sellers' agents' or brokers' draft payable in London in exchange for bill of lading and other shipping documents." "Foreign measure" was explained to mean measurement according to the custom of the port. Evidence was given by affidavit as to what the custom was, and a good deal of discussion took place before us as to what was the proper inference to be drawn from that evidence. It seems to me clear from the affidavits that in the case of wood goods despatched from the interior, of which the present cargo consisted, the only measurements taken are those taken by the appointed surveyors when the goods are loaded on board lighters for the purpose of being conveyed alongside the ship. These measurements are taken in the first instance for the purpose of ascertaining the price to be paid for the timber as between the original vendors of the timber and their buyer or buyers, and the measurements may be (as they were in this case) taken by a number of different surveyors at a number of different places. The measurements so taken are checked by a selected surveyor. Having regard to the purpose for which the measurements are taken, this checking must, I think, be a checking of the figures as relating to the quantities loaded on board the lighters, and not as relating to the quantities which arrive alongside the ship. This conclusion appears to agree with what is stated in paragraph 3 of Mr. Nelson Smith's affidavit. The position created by the purchase contract therefore appears to be this. The invoice is made out in, and the buyer must pay for, the quantities of timber

(1) 19 Q. B. D. 333.

loaded on to the lighters ; but the seller must deliver the timber to the vessel, and is responsible for any deterioration of quality or condition until the timber is sent alongside the vessel. The seller consequently is responsible in damages for any loss or deterioration arising between the time when the goods are loaded on to lighters and the time when they arrive alongside. The question which has to be determined in the present appeal has reference to the position of the charterers and the shipowners, and the contract of purchase can only be material (if material at all) as explaining the course of business and the custom of the port. The custom, so far as it affects the positions of the charterers and shipowners, is stated in paragraph 4 of Mr. Smith Sleeve's affidavit in these terms : " For the preparation of complete surveyors' return all the returns so prepared are sent in to a selected surveyor who checks the same and prepares a summary thereof ; the total figures so arrived at are then inserted in a bill of lading which is presented to the captain or ship's agent for signature."

For the purpose of enabling him to fulfil his contract with the respondents Mr. Nelson Smith chartered the steamship *Kylestrome*. The charterparty is dated May 28, 1913. It provides (clause 2) for payment of freight on measurement of quantity delivered as and when ascertained at port of discharge, and that all responsibility of the charterers is to cease as soon as the cargo is alongside, the vessel holding a lien upon the cargo for freight and demurrage. Clause 3 contains the excepted perils, which include perils of the seas. Clauses 12 and 13 are as follows : [His Lordship read them.]

The parties in the present case appear to have expressed in their written contract the extent to which they intended to be bound by the custom of the port, so that no question arises with regard to the custom apart from the construction of the written contract. By clause 13 the appellants agreed that the captain or agents should sign bills of lading " as per surveyors' return " ; the result of this agreement is that in the present case the parties assented to the course of business indicated in paragraph 4 of Mr. Smith Sleeve's affidavit. The conclusive evidence clause is the one upon which the questions involved in this appeal turn. The custom of the port does not touch this clause, in the sense that the shipowners are perfectly free,

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so far as the custom of the port is concerned, to decide whether they will or will not agree to any form of conclusive evidence clause. The shipowners must be taken to understand what their position is when they have undertaken to sign bills of lading "as per surveyors' return," and they must protect themselves by the language used in the clause itself, if they decide to bind themselves by a conclusive evidence clause or by a note in the margin of the bill of lading, if the master is compellable to sign for a quantity not received. The form of the clause to which the shipowners in the present case agreed provides (clause 14): "Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to ship as stated therein." Having regard to the other provisions of the charterparty, I think that the expression "delivered to ship" means delivered alongside in the sense that the goods have reached the ship and are under the control of the master, so that the responsibility of the charterers under clause 2 ceased. The precise dispute between the parties may conveniently be stated at this point. The appellants do not now dispute that the outturn of the cargo at the port of discharge was some eighty-five standards short of the bill of lading quantity; nor do they dispute that the bill of lading quantity was delivered alongside the ship; but they allege that the whole of the missing timber was lost by perils of the sea whilst being loaded from alongside on to the vessel, and they claim the right to give evidence of that fact. The respondents on the other hand say "No, you cannot do that; you are estopped by the terms of the bill of lading from disputing that the full bill of lading quantity was shipped on board your vessel." This brings me to a consideration of the terms of the bill of lading. The question of the proper construction to be put upon that document, having regard to the provisions of clause 14 of the charterparty, is the real question in the case. The bill of lading is in the usual form—"shipped in good order and well-conditioned by J. Nelson Smith on board the steamship *Kylestrome*"; then follows a statement of pieces and quantities as per surveyors' returns. The concluding paragraph incorporates all the terms, conditions, and exceptions contained in the charterparty. The appellants put their argument in two ways; their first contention was that the bill of lading should be construed as an acknowledgment merely that the goods were delivered alongside. I cannot

accept this argument. The language of the bill of lading is too clear to admit of any such construction; the expression "shipped on board" means and means only, in my opinion, what it says. The alternative contention is in substance this: If the bill of lading is to be treated as an acknowledgment of the receipt of the goods on board, then it does not come within the conclusive evidence clause of the charterparty at all. If the charterers had desired to bind the shipowners by that clause, they should have tendered a document which dealt with the delivery of the goods alongside, and not with the receipt of the goods on board. At this point it becomes material to consider whether any distinction can be drawn between the present case and *Lishman* v. *Christie*. (1) In that case as in this, by the terms of the charterparties (though in different language) the cargo had to be brought to the ship at charterers' risk and expense. In that case the conclusive evidence clause was framed to cover "cargo received as stated therein." In the present case it is "quantity delivered to ship as stated therein." In that case the bill of lading contained the word "shipped" only; in the present case the words are "shipped on board." The argument in that case was, as here, that the conclusive evidence clause provided that the bill of lading should be conclusive evidence only that the goods were received as therein stated, not that they were shipped on board. In that case the charterparty contained no similar provision to that contained in the charterparty under consideration requiring the master to sign bills of lading in any particular form or for any particular quantity; but material as such a clause may be as between the shipowners and the holder of the bill of lading, it does not, in my opinion, affect the liability of the charterer to bring the goods alongside. Under these circumstances I am unable to draw any sufficient distinction between the facts in *Lishman* v. *Christie* (1) and those in the present case to justify the conclusion that the decision in that case does not apply also to the present. For these reasons I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Trinder, Capron & Co.*

Solicitors for defendants: *William A. Crump & Son.*

(1) 19 Q. B. D. 333.

W. J. B.

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*July* 25, 26, 28.

## *In re* HALSTEAD.
## *Ex parte* RICHARDSON.

*Bankruptcy—Stock Exchange—Defaulting Member—Operation of Stock Exchange Rules—Official Assignee—"Assignment for benefit of creditors"—Deed of Arrangement—Non-registration—Supervening Bankruptcy of Member—Rights of Trustee in Bankruptcy—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 5—*Deeds of Arrangement Act*, 1913 (3 & 4 *Geo.* 5, *c.* 34), *ss.* 37, 42.

The application for admittance to membership of the Stock Exchange, and the Rules of the Stock Exchange, and the member's notice of default, operate as an assignment of his property for the benefit of his Stock Exchange creditors which is a deed of arrangement within the definitions in s. 4 of the Deeds of Arrangement Act, 1887, as extended by s. 37 of the Deeds of Arrangement Act, 1913; and such an assignment, not being registered, is void. Therefore the trustee in bankruptcy of the defaulter is entitled to the assets collected by the official assignee, even although the bankruptcy does not supervene until more than three months after the date of the notice of default.

THIS was an application that raised a question as to the validity of an assignment effected by the operation of the Stock Exchange Rules in these circumstances.

The debtor had applied to be and had been duly elected a member of the London Stock Exchange for the year commencing March, 1911, and had duly renewed his membership in respect of the year commencing March 25, 1914. Both applications for membership and renewed membership were made in writing and under and subject in all respects to the Rules and Regulations of the London Stock Exchange for 1911, of which the following are material:—

"160.—(1.) A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee, and thereby ceases to be a member.

"(2.) The request for such declaration shall be handed to the secretary not later than a quarter to three o'clock, or half-past twelve on Saturday, and the declaration shall be forthwith announced to the Stock Exchange. A declaration shall not be announced before a quarter to eleven o'clock."

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"165.—(1.) The official assignee shall collect and pay the assets into such bank and in such names as the committee may from time to time direct, and the same shall be distributed as soon as possible."

On July 29, 1914, the debtor, who was then carrying on his business under the style of T. & E. Halstead, wrote to the secretary of the committee as follows: "Will you kindly inform the house that we are unable to comply with our bargains." The result of this communication was that on the same day the debtor was duly declared a defaulter on the Stock Exchange. There was no other notice alleging the debtor to be a defaulter except the one given by himself, and at this time he was hopelessly insolvent and indebted in a large amount to outside creditors as well as to Stock Exchange creditors.

On October 26, 1914, Mr. Richardson, who as the official assignee of the Stock Exchange was collecting the debtor's assets for distribution amongst his Stock Exchange creditors, received a letter from a firm of solicitors stating that the debtor had committed an act of bankruptcy by not complying with a bankruptcy notice that had been served upon him and that they were then presenting a bankruptcy petition against him; and on the following November 12 Mr. Richardson received a further letter from the same solicitors stating that the bankruptcy petition had been presented and would be heard on the following December 4. The petition, however, was not presented until November 7, 1914, and a receiving order was made thereon on December 4, and was followed by adjudication. On December 31, 1914, the trustee in bankruptcy wrote to Mr. Richardson informing him that a receiving order had been made against the debtor on the previous December 4.

During 1915 Mr. Richardson, being under the erroneous impression that the petition had been presented on October 26, 1914,—i.e., within three months of the previous July 29—paid over sums amounting to 6869*l.* 14*s.* 10*d.* that he had collected to the trustee in bankruptcy. In May, 1916, Mr. Richardson first became aware that the true date of the petition was more than three months after July 29, 1914, and thereupon he applied for an order on the trustee to repay him the 6869*l.* 14*s.* 10*d.* on the ground that it had been paid to the trustee under a mistake.

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*E. W. Hansell*, for Mr. Richardson. The assignment to the official assignee under the Stock Exchange Rules was only liable to be defeated if a bankruptcy petition was presented against the debtor within three months of the date of his notice of default. Here three months elapsed before the petition was presented. The official assignee was always under the impression until May, 1916, that the petition had been presented on October 26, 1914. There seems to have been a blunder as to dates on both sides. The money was paid under a mistake, and the Court will order the trustee, who is an officer of the Court, to do what is right.

*Giveen*, for the trustee in bankruptcy. The whole transaction under the Stock Exchange Rules is against the policy of the bankruptcy laws and is void. If the debtor's application for membership and the Stock Exchange Rules operate as an agreement for the alienation of his assets on his insolvency, it falls within the principle of the class of cases that decide a man may not contract to withdraw his assets from the control of his creditors in the event of his bankruptcy: *Whitmore* v. *Mason* (1); *Higinbotham* v. *Holme* (2); *Ex parte Williams* (3); *Ex parte Jackson*. (4) But if the application of membership with the Stock Exchange Rules and the notice of default operate as an assignment of his assets, then it is a deed of arrangement as defined in the Deeds of Arrangement Acts, 1887 and 1913, and is void because it is not registered.

[*E. W. Hansell.* It is not disputed that if the debtor's notice of default operates as a deed of assignment it should be registered.]

It is submitted that it did so operate: *Tomkins* v. *Saffery*. (5) The assignment is not a deed of arrangement within the provisions of ss. 4 and 5 of the Act of 1887, because that Act is limited to assignments for the benefit of creditors generally; but s. 37 of the Act of 1913, which came into operation on April 1, 1914, extends the provisions of the Act of 1887 to assignments for the benefit of three or more creditors and includes an assignment for the benefit of a particular class of creditors. Further, the assignment is also within the statute 13 Eliz. c. 5, because it tends to defeat and delay the general body of creditors.

(1) (1861) 2 J. & H. 204, 215.
(2) (1811) 19 Ves. 88.
(3) (1877) 7 Ch. D. 138.
(4) (1880) 14 Ch. D. 725, 744.
(5) (1877) 3 App. Cas. 213, 230, 234.

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[HORRIDGE J. I think the statute of Elizabeth was never intended to meet a case of this character.]

Lastly, it is not disputed that the Court has jurisdiction to direct the repayment of this sum to the official assignee if he is entitled to it, but it is submitted that the Court will not do so where it will create an inequality amongst the creditors and produce an inequitable result.

*E. W. Hansell* in reply. The rights and position of the official assignee are established by the cases of *Richardson* v. *Stormont, Todd & Co.* (1) and *Lomas* v. *Graves & Co.* (2), and the effect of the Stock Exchange Rules does not necessarily provide that on the bankruptcy of the defaulter his assets shall go over in a way that is a fraud on the bankruptcy laws. In *Tomkins* v. *Saffery* (3) Lord Cairns points out that the rules do not defeat the operation of the bankruptcy laws. Admitting that a man may not dispose of his property so that on his bankruptcy it shall go over other than as the bankruptcy laws provide, there is nothing that prevents an insolvent from dealing with his property, but if his bankruptcy supervenes within a limited time his trustee in bankruptcy can set aside the transaction. In all the cases cited there was a bankruptcy within the time limit. The principles of the bankruptcy laws presuppose a bankruptcy and only apply on bankruptcy. Before April 1, 1914, when the Deeds of Arrangement Act, 1913, came into operation, the cases show that, apart from bankruptcy, the assignment that took place on the notice of default vested in the official assignee the whole of the assets of the defaulter. The Deeds of Arrangement Acts strike at transactions embodied in documents, and not at a transaction which on the happening of an event takes effect in pursuance of a contract previously made. Here there is no document on which it can be said that it constituted an assignment of the debtor's property within the meaning of the Acts. Nothing passed by the notice of default. It was only evidence that an event had happened which entitled the official assignee to step in and deal with the debtor's assets. If the notice of default had been given by a creditor, it could not be said to be an assignment.

*Cur. adv. vult.*

(1) [1900] 1 Q. B. 701. (2) [1904] 2 K. B. 557.
(3) 3 App. Cas. 213, 220.

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July 28. HORRIDGE J. This was a motion on behalf of the official assignee of the London Stock Exchange asking that the trustee in bankruptcy of Walter Furness Halstead might be ordered to return to the applicant, as such official assignee, the sum of 6869*l.* 14*s.* 10*d.* paid to the trustee under a mistake.

It appears that when the payments making up the sum of 6869*l.* 14*s.* 10*d.* were made by the official assignee he was under the impression the petition had been presented on October 27, 1914, and therefore had been presented within three months of July 29, 1914, on which date the bankrupt had been declared a defaulter on the London Stock Exchange. The truth was the petition was not presented until November 7, 1914, and therefore the period of three months after July 29, 1914, had elapsed. If the official assignee's title as such assignee is a good one, I am satisfied I ought to order the trustee in bankruptcy to refund these moneys, as he would then have no legal right to them as against the official assignee. In answer to the motion, however, it was said the title of the official assignee depended upon an assignment which was in writing and which ought to have been registered under the Deeds of Arrangement Acts, 1887 and 1913. The facts are as follows: [His Lordship stated the facts and continued:]

It was contended before me on behalf of the trustee that the three documents, the application for renewal of membership from March 25, 1914, the Rules and Regulations of the Stock Exchange, and the notice of default, constituted an assignment in writing of the debtor's property for the benefit of creditors, who in this case exceeded three in number, and therefore, not being registered, such assignment was void, and the official assignee had never had any title to the moneys which he had paid the trustee. If the assignment was completed by the two documents, the application for membership from March 25, 1914, and the Stock Exchange Rules, the assignment would clearly not come within the Act of 1913, which did not come into operation until April 1, 1914. It was said, however, that any taking possession by the official assignee under the position created by these two documents was wrongful, as such two documents constituted an agreement with the bankrupt to allow possession to be taken of his assets in the event of his being declared a defaulter, and that this was a fraud violating the

principle of the Court of Bankruptcy laid down in *Ex parte Williams* (1) and *Ex parte Jackson.* (2) It was alternatively said that, these two documents being void for this reason, the official assignee must fall back on the one document of July 29, 1914, as his document of title, and that this document operated as an assignment after the Act had come into operation. The principle governing the above cases is stated in *Whitmore* v. *Mason* (3) to be that a man cannot by contract or otherwise qualify his own interest by a condition to take effect on bankruptcy determining or controlling him in the event of his own bankruptcy to the disappointment or delay of his creditors. In this case there was no covenant alienating the property on bankruptcy, but it was said that the provisions for handing over on becoming a defaulter amounted to the same thing, and the case of *Whitmore* v. *Mason* (3) was relied upon because there the contract was in the event of bankruptcy or insolvency, and the learned Vice-Chancellor did not think the alienation from the bankrupt's creditors was made valid, because on the wording of the covenant it might have taken place previously on insolvency, and he says a bankrupt is usually insolvent before he commits an act of bankruptcy. In that case it is to be observed that the covenant was to alienate on bankruptcy as well as insolvency, and no case was cited to me in which it has been decided that an alienation on insolvency alone is bad, and my view is that the arrangement contemplated under the Rules of the Stock Exchange which the bankrupt agreed to by becoming a member does not come within the principle of the covenant providing for alienation on bankruptcy. I am confirmed in this view because of the language of Lord Cairns L.C. in *Tomkins* v. *Saffery* (4), where he says, speaking of rules similar to the ones in question, "They do not seem to me to be rules contemplating or intending in any way to warp or strain, or in any way to elude or defeat the operation of the bankruptcy law of the country"; and the language of Collins M.R. in *Lomas* v. *Graves & Co.* (5), where he says, speaking of the same rules, "There is under the Stock Exchange rules an assignment of all the defaulter's assets to the official assignee, which is valid except so far as it may

(1) 7 Ch. D. 138.
(2) 14 Ch. D. 725.
(3) 2 J. & H. 204, 210.
(4) 3 App. Cas. 213, 220.
(5) [1904] 2 K. B. 557, 560.

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be impeachable in the event of bankruptcy proceedings being subsequently taken against the defaulter." In my judgment these two documents would not be rendered void by the doctrine as to contracts alienating property on bankruptcy. It is necessary, therefore, to see what contract was created by these two documents so as to ascertain whether or not the notice of July 29, 1914, formed a portion of the assignment. In *Tomkins* v. *Saffery* (1) Lord O'Hagan says: "According to those rules when he became unable to fulfil his engagements, and announced the fact to the secretary, the official assignees were at once brought into action, and it was their duty to take instant proceedings for seizing his assets and securing his creditors"; and Lord Blackburn says: "I confess, my Lords, my own impression is that it means, not only that the official assignees shall collect the assets, but that a defaulting member is bound by the agreement which he made when he entered the Stock Exchange to give them the assets." It is to be observed that the assets were only to be handed over in the event of his becoming a defaulter. Therefore the assignment in this case would not operate until this event had happened. On the evidence before me no other person had taken any step to make him a defaulter, and in my view the assignment which is spoken of in the judgment to which I have referred of the Master of the Rolls in *Lomas* v. *Graves & Co.* (2) was not complete until he himself had given notice as to his being such defaulter. There was no power to compel him to declare himself a defaulter, and the assignment might never have taken place at the time it did take place unless he had voluntarily given notice of default. Directly the default was notified the declaration by the Stock Exchange of him as a defaulter worked automatically in accordance with the rules, and his act in giving the declaration completed the conditions under which he was declared a defaulter. In my view, therefore, the assignment was contained in the three documents, the application for re-election for membership, the Rules and Regulations of the Stock Exchange, and the declaration of July 29, 1914.

Is this a deed of arrangement within the definitions in s. 4 of the Deeds of Arrangement Act, 1887, as extended by the Bankruptcy and Deeds of Arrangement Act, 1913? That section provides that

(1) 3 App. Cas. 213, 229, 232. (2) [1904] 2 K. B. 557, 660.

a deed of arrangement shall include (*a*) an assignment of property, (*e*) an instrument authorizing any person to realize or dispose of the debtor's business with a view to the payment of his debts. I think the assignment to the official assignee was an assignment of property and was also such an instrument as is described in sub-s. (*e*). It is quite true the Deeds of Arrangement Acts do not invalidate transactions, but transactions embodied in documents. For the reasons I have stated, directly the declaration of July 29, 1914, was handed in the assignment worked automatically and was occasioned by the effect of the three documents I have mentioned. It is important to notice that the statements contained in *Tomkins* v. *Saffery* (1), *Richardson* v. *Stormont, Todd & Co.* (2), and *Lomas* v. *Graves & Co.* (3), as to the validity of such an assignment, were made at the time when its validity could have been attacked under the rule in *Ex parte Williams* (4), but not for failure to comply with the requirements which are dealt with under the Deeds of Arrangement Act, 1913, as this Act for the first time made void an assignment for the benefit of creditors other than the whole body of creditors. I think this motion on behalf of the official assignee must be dismissed with costs.

Leave to appeal was granted.

Solicitors for the official assignee: *Travers-Smith, Braithwaite & Co.*

Solicitors for the trustee: *Cohen & Cohen.*

(1) 3 App. Cas. 213.
(2) [1900] 1 Q. B. 701.
(3) [1904] 2 K. B. 557.
(4) 7 Ch. D. 138.

H. L. F.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1916, will be as follows:—

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**ACTION**—*Cause of—Sole Right of taking Photographs.*

An exclusive right to take photographs does not, in law, exist as property.

The promoters of a dog show purported to assign the sole photographic rights in connection with the show. The assignee purported to assign to the plaintiffs the sole Press photographic rights at the show. The defendants by an agent took photographs of the show although previously informed that the promoters had assigned the exclusive right to do so. The promoters of the show caused no notice to be placed on the tickets of admission or otherwise forbidding the taking of photographs at the show. The defendants having published in an illustrated journal the photographs they had taken, the plaintiffs brought an action for an injunction to restrain them from continuing to do so:—

*Held*, that the action would not lie, inasmuch as the promoters of the dog show had, in law, no exclusive right of photographing anything there, and therefore could not assign that right as property. Their possession of the land on which the show was held would have entitled them to make their purported assignment effective by making conditions as to admission and stipulating that no one should enter unless he agreed not to take any photographs, but they had not done so, and therefore the plaintiffs had failed to make out any cause of action. SPORTS AND GENERAL PRESS AGENCY, LD. *v.* "OUR DOGS" PUBLISHING CO. - - - Horridge J. 880

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2. —— *Judgment for Price of Goods sold—Judgment unsatisfied—Subsequent Action against another Person for Price of same Goods—No Joint Contract—Action not barred by the Judgment—Interlocutory Final Appeal.*

When there is no joint contract or relation of principal and agent, an unsatisfied judgment against one person for the price of goods sold is not a bar to a subsequent action against another person for the price of the same goods.

The test of whether an appeal is final or interlocutory is the nature of the order immediately under appeal. Where, therefore, on appeal from a final judgment of a county court, a Divisional Court made an order for a new trial:—

*Held*, that an appeal from the Divisional Court to the Court of Appeal was an appeal from an interlocutory order and was rightly entered in the interlocutory list. ISAACS & SONS *v.* SALBSTEIN AND ANOTHER - - - C. A. 139

**ADULTERATION**—*Milk—Sale to Prejudice of Purchaser—Sample taken on Subsequent Day—Evidence—Admissibility—Milk and Dairies (Consolidation) Act*, 1915 (*5 & 6 Geo. 5, c. 66*), *Third Schedule.*

In a prosecution under the Sale of Food and Drugs Acts, 1875 to 1907, for unlawfully selling to the prejudice of the purchaser milk which is not of the nature, substance, and quality demanded by him, evidence as to the circumstances connected with a sample and its nature, substance, and quality taken on the day succeeding that on which the offence is alleged to have been committed is admissible on behalf of the prosecution for the purpose of showing that the milk sold on the day that the offence is alleged to have been committed could not have been in the condition in which it came from the cow.

But it is a condition precedent to the admissibility of the evidence (1.) that the sample taken on the succeeding day was from the same cow if the milking on the two days was from one cow, or from the same herd of cows if the milking was the product of a mixture; (2.) that the sample taken on the succeeding day was from the same milking, e.g., the morning milking as distin-

**ADULTERATION**—*continued.*

guished from the evening milking; (3.) that there is prima facie proof that the cows were milked in the same way, i.e., by some experienced person who understands the milking of cows.

The evidence would not be admissible on behalf of the prosecution for the purpose of showing that the sample taken on the succeeding day was below the standard required by the Regulations made under the Acts, and that therefore the accused had on the succeeding day committed an offence of the same nature as that which is the subject of the charge.

The Third Schedule to the Milk and Dairies (Consolidation) Act, 1915, has no bearing upon the admissibility of the evidence. WILKINSON *v.* CLARK - - - - - **Div. Ct. 636**

2. —— *Sale to Prejudice of Purchaser—Quality of Article demanded—Milk—No Addition or Abstraction—Deficiency in Milk Fat—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 2—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 4—*Sale of Milk Regulations*, 1901, *reg.* 1.

By s. 6 of the Sale of Food and Drugs Act, 875, no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser, under a penalty.

By s. 4 of the Sale of Food and Drugs Act, 1899, the Board of Agriculture were empowered to make regulations for determining what deficiency in any of the normal constituents of genuine milk should for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary was proved, that the milk was not genuine. By No. 1 of the Sale of Milk Regulations, 1901, made under this enactment, where a sample of milk contains less than 3 per cent. of milk fat it is to be presumed that the milk is not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water.

A farmer contracted to sell new milk each morning to a purchaser who was a retail dealer. The milk was delivered in churns. Nothing was added to or abstracted from the milk. The herbage on which the cows producing the milk were fed was in a watery condition owing to heavy rain in previous months. As a consequence the milk produced was copious but inferior. To maintain the quantity of milk the cows were also fed on green maize. They were given in addition such an amount of cake each day as was usual under normal conditions. On analysis the milk in a churn delivered to the purchaser was found to contain less than 3 per cent. of milk fat. The farmer was summoned before a Court of summary jurisdiction under s. 6 of the Sale of Food and Drugs Act, 1875, for selling to the prejudice of the purchaser milk which was not of the nature, substance, and quality of the article demanded by the purchaser. The justices found that milk taken from a healthy herd should show not less than 3 per cent. of milk fat, and that the deficiency was due to the manner in which the farmer fed his cows with the object of obtaining a very large

**ADULTERATION**—*continued.*

supply of milk without regard to the quality thereof, and they convicted the farmer. On a case stated for the opinion of the King's Bench Division :—

*Held* by Darling, Lawrence, and Avory JJ. (Bray and Scrutton JJ. dissenting), that the conviction should be quashed on the ground that there was no evidence of an offence under s. 6 of the Act.

*Held* by Bray and Scrutton JJ., that the case should be sent back to the justices ;

By Bray J. that they might find whether the milk supplied was new morning milk of merchantable quality, that being presumably the quality demanded by the purchaser ;

By Scrutton J. that they might find (1.) what quality, if any, was demanded by the purchaser, and (2.) whether the milk supplied was of that quality.

*Wolfenden* v. *McCulloch* (1905) 69 J. P. 228 and *Scott* v. *Jack*, 1912 S. C. (J.) 87, approved. *Smithies* v. *Bridge* [1902] 2 K. B. 13 commented on. HUNT *v.* RICHARDSON - - **Div. Ct. 446**

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By art. 12 of the Aliens Restriction (Consolidation) Order, 1914, made under the Aliens Restriction Act, 1914, a Secretary of State may order the deportation of any alien :—

*Held*, that the article is within the power conferred by the Aliens Restriction Act, 1914, upon His Majesty in Council in time of war or imminent national danger or great emergency to impose restrictions on aliens.

*Semble* that, if it appears to the Court that a misuse of the power conferred upon the Executive is imminent, the Court can, upon an application for a writ of habeas corpus, deal with the matter, even though, in the form in which the application is made, the point is not technically before the Court and the Executive alleges that the applicant is in legal custody.

An alien who is suspected of being of immoral and criminal character may be a person against whom an order of deportation under the article may properly be made as being necessary or expedient with a view to the safety of the realm.

*Quaere* whether the Executive or the alien has the right to choose the country to which he is to be deported.

An affidavit in support of an application for a writ of habeas corpus contained a statement by the applicant that he "escaped from Russia for political reasons" at a date when he was about seventeen years of age :—

*Held*, that the bare statement of the applicant that he was a political refugee, unsupported by any evidence, was not sufficient to entitle the

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Court to order the writ to issue. REX *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SARNO - - - - - - **Div. Ct. 742**

2. —— *Nationality—Son born Abroad of Naturalized British Father—Son residing during Infancy in United Kingdom with Widowed Mother—No Grant of Certificate of Naturalization to Mother—Status of Son—Naturalization Act*, 1870 (33 *Vict. c.* 14), *s.* 10.

Sect. 10, sub-s. 1, of the Naturalization Act, 1870, provides that "A married woman shall be deemed to be a subject of the State to which her husband is for the time being a subject"; and sub-s. 5 provides that "Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject."

The appellant was born in Germany in 1875. His parents were both aliens by birth, but after their marriage, and before the birth of the appellant, the father became a naturalized British subject under the Aliens Act, 1844. The appellant continued to reside in Germany till the death of his father in 1887, but thereafter he came to England, and he resided there during a portion of his infancy with his widowed mother, who, however, had not obtained a certificate of naturalization in the United Kingdom:—

*Held*, that, even assuming that the appellant's father, who was naturalized under the Aliens Act, 1844, became entitled to the privileges conferred by the Naturalization Act, 1870, the appellant did not obtain the status of British nationality under s. 10, sub-s. 5, of the latter Act, for, although his mother, by virtue of her husband's naturalization, became entitled to all the rights and privileges of a British subject, she had not obtained a certificate of naturalization in the United Kingdom. JAFFÉ *v.* KEEL - **Div. Ct. 476**

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**ARBITRATION**—*Costs—Discretion of the Arbitrator—Costs of Successful Plaintiff—Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *Sched. II., rr.* 14, 15.

The direction in the Agricultural Holdings Act, 1908 (Sched. II., rr. 14, 15), that the costs of and incidental to an arbitration under the Act shall be in the discretion of the arbitrator, does not give him any wider discretion than that exercised by a judge of the High Court. He cannot, therefore, order a plaintiff who has succeeded in recovering a substantial sum, though much less than his claim, to pay the costs of both parties, unless he has before him material which enables him to find that the plaintiff never ought to have taken the proceedings or has been guilty of misconduct.

The case of an arbitration under the Arbitration Act, 1889, where the parties have submitted the question of costs to a tribunal selected by themselves, is different.

Award of arbitrator and decision of the Divisional Court (Ridley and Lord Coleridge JJ.) [1916] 1 K. B. 452 reversed. LORD ASHBURTON *v.* GRAY - - - - - - - **C. A. 353**

2. —— *Costs—Lands Clauses Acts—Arbitration—Special Case stated by Arbitrator—Lands Clauses Act*, 1845, *s.* 34—*Arbitration Act*, 1889, *s.* 24; *Sched. I., par.* (*i.*).

The fact that an arbitrator in an arbitration under the Lands Clauses Act, 1845, could not have stated a special case for the opinion of the Court before the passing of the Arbitration Act, 1889, does not prevent the costs of such a special case from being "incident to" the arbitration within the meaning of s. 34 of the earlier Act. Such costs are not in the discretion of the arbitrator under Sched. I., par. (i.), of the Arbitration Act, but must be borne by the promoters, unless the sum awarded is equal to or less than that offered by them. SIDNEY *v.* NORTH EASTERN RY. CO. - **Avory J. 760**

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*Statute of* 8 *Anne, c.* 14, *s.* 1—*Bankruptcy Act,* 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 41, *sub-s.* 2.

Sect. 1 of the statute of 8 Anne, c. 14, is not overridden by s. 41 of the Bankruptcy Act, 1914, except when the execution is itself avoided by the bankruptcy laws; and therefore "the balance" of the proceeds of sale of the goods of a debtor under an execution, which sub-s. 2 of s. 41 of the Bankruptcy Act, 1914, directs shall be paid over by the sheriff to the trustee in bankruptcy of the debtor, means the balance of the execution proper, that is, the balance after payment of the sheriff's costs. The sum (if any) paid by the execution creditor in discharge of the landlord's rent, which s. 1 of the statute 8 Anne, c. 14, directs the sheriff to levy and pay to the execution creditor, must be paid to him direct.

Where, therefore, an execution creditor, after levy by the sheriff on the goods of the debtor, paid 220*l.*, being the landlord's claim for rent, and the sheriff then sold but, the debtor's bankruptcy supervening, paid over the proceeds of sale to the trustee in bankruptcy after deducting only his costs of execution :—

*Held,* that the trustee had 220*l.* which formed no part of the debtor's estate, and the Court, applying the principle of *In re Condon* (1874) L. R. 9 Ch. 609, ordered the trustee to pay that sum to the execution creditor.

*In re Humphreys* (1870) 21 L. T. 684, *In re Cole* (1872) L. R. 14 Eq. 178, and *In re Ayshford* (1887) 4 Morrell, 164, distinguished. *In re* Craig & Sons. *Ex parte* Hinchcliffe

**Horridge J. 497**

**2.** —— *Stock Exchange—Defaulting Member—Operation of Stock Exchange Rules—Official Assignee—"Assignment for benefit of creditors"—Deed of Arrangement—Non-registration—Supervening Bankruptcy of Member—Rights of Trustee in Bankruptcy—Deeds of Arrangement Act,* 1887 (50 *& 51 Vict. c.* 57), *ss.* 4, 5—*Deeds of Arrangement Act,* 1913 (3 *& 4 Geo.* 5, *c.* 34), *ss.* 37, 42.

The application for admittance to membership of the Stock Exchange, and the Rules of the Stock Exchange, and the member's notice of default, operate as an assignment of his property for the benefit of his Stock Exchange creditors which is a deed of arrangement within the definitions in s. 4 of the Deeds of Arrangement Act, 1887, as extended by s. 37 of the Deeds of Arrangement Act, 1913; and such an assignment, not being registered, is void. Therefore the trustee in bankruptcy of the defaulter is entitled to the assets collected by the official assignee, even although the bankruptcy does not supervene until more than three months after the date of the notice of default. *In re* Halstead. *Ex parte* Richardson

**Horridge J. 902**

**3.** —— *Summary Administration—Release of Trustee—After-acquired Property—Administration and Distribution—Employment of Solicitor—Powers of Official Receiver as Trustee—Permission of Board of Trade—Powers of Creditors—Bankruptcy Act,* 1883 (46 *& 47 Vict. c.* 52), *s.* 121—*Bankruptcy Act,* 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 20, *sub-s.* 10; *s.* 56, *sub-s.* 3; *s.* 79, *sub-s.* 1; *s.* 129.

In the case of a summary administration and adjudication in bankruptcy under s. 121 of the Bankruptcy Act, 1883, or s. 129 of the Bankruptcy Act, 1914, where the official receiver as trustee has been released under s. 93 of the later Act and continues to act under sub-s. 4 of that section, the Board of Trade is by s. 20, sub-s. 10, of that Act the proper authority to give permission to the official receiver as trustee to employ a solicitor under s. 56, sub-s. 3, of the Act.

Sect. 79, which directs the trustee, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, to have regard to any directions given by resolution of the creditors at a general meeting, is "subject to the provisions of this Act," including the provisions of the Act of 1914 mentioned above. Consequently an official receiver acting as trustee under s. 93, sub-s. 4, need not have regard to any directions of the creditors as to whom he shall employ as solicitor.

*Semble* that the employment of a solicitor is not a matter "in the administration of the property of the bankrupt or the distribution thereof amongst his creditors" within the meaning of s. 79.

*In re Geiger* [1915] 1 K. B. 439 followed.

*In re Consolidated Diesel Engine Manufacturers* [1915] 1 Ch. 192 questioned. *In re* Salmon. *Ex parte* The Official Receiver

**Div. Ct. 510**

**BILL OF LADING.** ¶

*See* Shipping.

**BILL OF SALE**—*Subsequent Agreement—Defeasance—Bills of Sale Act,* 1878 (41 *& 42 Vict. c.* 31), *s.* 10, *sub-s.* 3—*Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 *& 46 Vict. c.* 43), *ss.* 8, 9.

By s. 10, sub-s. 3, of the Bills of Sale Act, 1878, if a bill of sale is made or given subject to "any defeasance . . . . not contained in the body thereof, such defeasance . . . . shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration . . . . otherwise the registration shall be void."

After a bill of sale had been given by the grantor, and as a separate transaction, an agreement was entered into between the grantor and grantee that the grantee would not enforce the bill of sale so long as the grantor continued to perform certain conditions. The bill of sale was registered without the terms of the subsequent agreement being included in it :—

*Held,* that the agreement, not having been made previous to or contemporaneously with the giving of the bill of sale, was not a defeasance within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878; that it was therefore not necessary that the agreement should be included in or written on the same paper or parchment as the bill of sale; and that consequently the bill of sale was good. Lester *v.* Hickling

**Scrutton J. 302**

**BOND**—for due performance of contract—Arbitration clause in contract—Reference by consent outside clause—Contractor ordered to pay costs—Liability of surety - - - 568
*See* PRINCIPAL AND SURETY.

**BREACH**—Charterparty—Failure to load - 826
*See* SHIPPING. 3.

**BRICKWORKS**—Erection of buildings—Land in reserve for brick-earth—Land "used bona fide for any business" - 553
*See* REVENUE. 2.

**BUSINESS PREMISES**—situated abroad—Annual value of - - - 560
*See* REVENUE. 1.

**CAPTAIN**—Ship—Signing bills of lading in prescribed form - - - - 702
*See* SHIPPING. 4.

**CARGO**—Loss of—Ship sunk by German submarine—Liability of shipowner - 783
*See* SHIPPING. 1.

**CARNAL KNOWLEDGE**—Girl between thirteen and sixteen - - - - 621
*See* CRIMINAL LAW. 1.

**CARRIAGE BY SEA.**
*See* SHIPPING.

**CASES**:—

—— *Allen* v. *Flood* - [1898] A. C. 1, 96
Dicta of Lord Watson in, followed.
STOTT *v.* GAMBLE - - - 504

—— *Ashburton (Lord)* v. *Gray* [1916] 1 K. B. 452
Reversed - - - - C. A. 353

—— *Becker, Gray & Co.* v. *London Assurance Corporation* [1915] 3 K. B. 410.
Affirmed - - - - C. A. 156

—— *Birmingham Corporation* v. *Allen* (1877) 6 Ch. D. 284.
Distinguished. MANLEY *v.* BURN
C. A. 121

—— *Brake* v. *Inland Revenue Commissioners* [1915] 1 K. B. 731.
Principles laid down in, applied. FERGUSON *v.* INLAND REV. COMMRS.
553

—— *Brass* v. *Maitland* (1856) 26 L. J. (Q.B.) 49, 57.
Judgment of Crompton J. in, followed. MITCHELL, COTTS & Co. *v.* STEEL BROTHERS & Co. - - - 610

—— *Brintons, Ld.* v. *Turvey* - [1905] A. C. 230
Applied. SCOTT *v.* PEARSON - C. A. 61
Distinguished. PYPER *v.* MANCHESTER LINERS, LD. - - - C. A. 691

—— *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* [1916] 1 A. C. 650.
Distinguished. BECKER, GRAY & Co. *v.* LONDON ASSURANCE CORPORATION
C. A. 156

**CASES**—*continued.*

—— *British Workman's and General Assurance Co.* v. *Cunliffe* (1902) 18 Times L. R. 425, 502.
Explained. HUGHES *v.* LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY
C. A. 482

—— *Capel* v. *Soulidi* - [1916] 1 K. B. 439
Affirmed - - - - C. A. 365

—— *Carter* v. *John Lang & Sons*, 1908 S. C 1198.
Applied. COX *v.* GEORGE TROLLOPE & SONS - - - - C. A. 682

—— *Clink* v. *Radford* - [1891] 1 Q. B. 625
Followed. JENNESON, TAYLOR & Co. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - - - - - 702

—— *Consolidated Diesel Engine Manufacturers, In re* [1915] 1 Ch. 192.
Questioned. *In re* SALMON
Div. Ct. 510

—— *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127.
Distinguished. MANLEY *v.* BURN
C. A. 121

—— *Davidson* v. *New Tabernacle (Old Street Congregational) Approved Society* [1915] 3 K. B. 569.
Reversed - - - - C. A. 80

—— *Davis* v. *Garrett* - (1830) 6 Bing. 716
Approved. MORRISON (JAMES) & Co. *v.* SHAW, SAVILL, AND ALBION Co
C. A. 783

—— *Dennis* v. *A. J. White & Co.* [1916] 2 K. B. 1
Followed. INCE *v.* REIGATE EDUCATION COMMITTEE - - C. A. 671

—— *Geiger, In re* - [1915] 1 K. B. 439
Followed. *In re* SALMON - Div. Ct. 510

—— *Godden* v. *W. Cowlin & Son* [1913] 1 K. B. 590.
Explained. COX *v.* GEORGE TROLLOPE & SONS - - - - C. A. 682

—— *Halsey* v. *Lowenfeld* - [1916] 1 K. B. 143
Affirmed - - - - C. A. 707

—— *Hansen* v. *Harrold* - [1894] 1 Q. B. 612
Followed. JENNESON, TAYLOR & Co. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - - - - - 702

—— *Harlock* v. *Owners of the Coquet* (1914) 7 B. W. C. C. 88, 90.
Followed. STEVENS *v.* THORNE & Co.
C. A. 69

—— *Heath's Garage, Ld.* v. *Hodges* [1916] 1 K. B. 206.
Affirmed - - - - C. A. 370

—— *Hoole U. D. C.* v. *Fidelity and Deposit Co. of Maryland* [1916] 1 K. B. 25.
Affirmed - - - - C. A. 568

—— *Inland Rev. Commrs.* v. *Devonshire (Duke)* [1914] 2 K. B. 627.
Principles laid down in, applied. FERGUSON *v.* INLAND REV. COMMRS.
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**CASES**—*continued.*

—— *Ismay, Imrie & Co.* v. *Williamson* [1908] A. C. 437.
Distinguished. PYPER *v.* MANCHESTER LINERS, LD. - - - **C. A. 691**

—— *Jaeger* v. *Mansions Consolidated* (1903) 87 L. T. 690.
Followed. MALZY *v.* EICHHOLZ **C. A. 308**

—— *Kirkwood* v. *Gadd* - [1910] A. C. 422
Considered. FINEGOLD *v.* CORNELIUS **C. A. 719**

— *Leiston Gas Co.* v. *Leiston-cum-Sizewell U. C.* [1916] 1 K. B. 912.
Affirmed - - - - **C. A. 428**

—— *Lilley* v. *Doubleday* - (1881) 7 Q. B. D. 510
Approved. MORRISON (JAMES) & Co. *v.* SHAW, SAVILL, AND ALBION CO. **C. A. 783**

—— *Lishman* v. *Christie* (1887) 19 Q. B. D. 333
Approved and followed. CROSSFIELD & Co. *v.* KYLE SHIPPING CO. - **C. A. 885**

—— *Malone* v. *Cayzer, Irvine & Co.* (1908) 1 B. W. C. C. 27.
Followed. WITHERS *v.* LONDON, BRIGHTON, AND SOUTH COAST RY. CO. **C. A. 772**

—— *Maskery* v. *Lancashire Shipping Co.* (1914) 7 B. W. C. C. 428.
Distinguished. PYPER *v.* MANCHESTER LINERS, LD. - - - **C. A. 691**

—— *Melluish* v. *London C. C.* [1914] 3 K. B. 325
Followed. GORDON HOTELS, LD. *v.* LONDON C. C. - - - **Div. Ct. 27**

—— *Morgan* v. *Owners of S.S. Zenaida* (1909) 2 B. W. C. C. 19.
Distinguished. PYPER *v.* MANCHESTER LINERS, LD. - - - **C. A. 691**

—— *Morrison (James) & Co.* v. *Shaw, Savill, and Albion Co.* [1916] 1 K. B. 747.
Affirmed - - - - **C. A. 783**

—— *Munday (J. R.), Ld.* v. *London C. C.* [1916] 1 K. B. 159.
Affirmed - - - - **C. A. 331**

—— *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* [1908] 1 Ch. 335, 359.
Dicta of Buckley L.J. in, followed. STOTT *v.* GAMBLE - - - **504**

—— *Payne* v. *Clifton* - (1910) 3 B. W. C. C. 439
Followed. STEVENS *v.* THORNE & Co. **C. A. 69**

—— *Perry* v. *Wright* - [1908] 1 K. B. 441
Applied. COX *v.* GEORGE TROLLOPE & SONS - - - - - **C. A. 682**

—— *Pierce* v. *Provident Clothing and Supply Co.* [1911] 1 K. B. 997.
Distinguished. INCE *v.* REIGATE EDUCATION COMMITTEE - - **C. A. 671**

— *Pontifex* v. *Midland Ry. Co.* (1877) 3 Q. B. D. 23.
Observed upon. BOOTH STEAMSHIP CO. *v.* CARGO FLEET IRON CO. **C. A. 570**

**CASES**—*continued.*

—— *Prance* v. *London C. C.* [1915] 1 K. B. 688
Followed. GORDON HOTELS, LD. *v.* LONDON C. C. - - - **Div. Ct. 27**

—— *Read* v. *Baker* - [1916] 1 K. B. 927
Followed. INCE *v.* REIGATE EDUCATION COMMITTEE - - **C. A. 671**

—— *Rex* v. *Essex JJ.* - [1916] 1 K. B. 665
Affirmed - - - - **C. A. 406**

—— *Russell* v. *Town and County Bank* (1888) 13 App. Cas. 418.
Applied. STEVENS *v.* E. BOUSTEAD & Co. - - - - - - **560**

—— *Savoy Hotel Co.* v. *London C. C.* [1900] 1 Q. B. 665.
Distinguished. GORDON HOTELS, LD. *v.* LONDON C. C. - - **Div. Ct. 27**

—— *Scott* v. *Jack* - - 1912 S. C. (J.) 87
Approved. HUNT *v.* RICHARDSON **Div. Ct. 446**

—— *Sheerin* v. *Clayton & Co.* [1910] 2 I. R. 105
Distinguished. PYPER *v.* MANCHESTER LINERS, LD. - - - **C. A. 691**

—— *Smithies* v. *Bridge* - [1902] 2 K. B. 13
Commented on. HUNT *v.* RICHARDSON **Div. Ct. 446**

—— *Teutonia, The* (1871) L. R. 3 A. & E. 394; (1872) L. R. 4 P. C. 171.
Distinguished. ST. ENOCH SHIPPING CO. *v.* PHOSPHATE MINING CO. - **624**

—— *Usher's Wiltshire Brewery* v. *Bruce* [1915] A. C. 433.
Applied. STEVENS *v.* E. BOUSTEAD & Co. - - - - - - **560**

—— *Wedd* v. *Porter* - - (1916) 113 L. T. 819
Reversed - - - - **C. A. 91**

—— *Whiteman* v. *Sadler* - [1910] A. C. 514
Considered. FINEGOLD *v.* CORNELIUS **C. A. 719**

—— *Wolfenden* v. *McCulloch* (1905) 69 J. P. 228
Approved. HUNT *v.* RICHARDSON **Div. Ct. 446**

**CAUSE OF ACTION** — Sole right of taking photographs - - - - **880**
*See* ACTION. 1.

**CESSER CLAUSE** - - - - - **702**
*See* SHIPPING. 4.

**CESSPOOL** - - - - - - - **38**
*See* LOCAL GOVERNMENT. 1.

**CHARTERPARTY.**
*See* SHIPPING.

**C.I.F. TERMS.**
*See* SALE OF GOODS.

**CINEMATOGRAPH** — *Licence — Conditions of Licence — Reasonable Conditions — Validity of Licence—Interference with Contractual Rights—Just Cause or Excuse.*

A licensing authority under the Cinematograph Act, 1909, licensed the proprietors of a theatre to use it for the exhibition of cinematograph films. The licence was subject to the

**CINEMATOGRAPH**—*continued.*
following condition :—" No film shall be shown that is objectionable or indecent or anything likely or tending to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace, and no offensive representations of living persons shall be shown. Provided also that no film shall be exhibited if notice that the justices "—i.e., the licensing authority—" object to such film has been given to the licensee."

Grantees of the right of letting for exhibition a certain film agreed to let the film to the proprietors of the theatre for an agreed sum. The licensing authority gave notice to the proprietors of the theatre that they objected to the exhibition of the film. In an action by the grantees against the licensing authority for interfering with their contractual rights without just cause or excuse: —

*Held*, that the meaning of the condition was that the licensing authority might give notice of objection to a film where they had bona fide and in the judicial exercise of their discretion come to the conclusion that the film was objectionable on one of the grounds mentioned therein, and that so interpreted the condition was reasonable and valid.

*Held*, also, that, even if the condition was unreasonable and void, the grantees had no cause of action, inasmuch as there was no evidence that the licensing authority knowingly or for their own ends induced the licensees to commit an actionable wrong.

Dicta of Lord Watson in *Allen* v. *Flood* [1898] A. C. 1, 96, and Buckley L.J. in *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* [1908] 1 Ch. 335, 359, followed. STOTT *v.* GAMBLE - - - - - **Horridge J. 504**

**COMPENSATION**—Employer and workman.
*See* WORKMEN'S COMPENSATION.

**COMPENSATION AUTHORITY** — Reference to — Licence — Renewal — Evidence —Differentiation - - - **126**
*See* LICENSING ACTS.

**CONCLUSIVE EVIDENCE**—Estoppel - **885**
*See* SHIPPING. 2.

**CONSTRUCTIVE TOTAL LOSS** - - **156**
*See* INSURANCE (MARINE). 1.

**CONTRACT**—*Illegality—Public Policy—Assignment of present and future Earnings—Covenant not to leave present Employment without Sanction of Assignee.*

By an indenture made between a person, therein called " the mortgagor," who was a clerk in the employment of the defendant company, and the plaintiff, therein called " the lender," the mortgagor, who was owing certain sums to various creditors which the lender agreed to pay on having the repayment secured to him in manner therein appearing, assigned to the lender, inter alia, all the salary, wages, or other moneys then or thereafter, during the continuance of the security, to become due to him under his employment with the defendants or with any other employers, to hold to the plaintiff absolutely but subject to a proviso for redemption. The mortgagor then covenanted that he would repay the lender by certain instalments ; that during the continuance of the security he would not, without the express sanction in writing of the lender, determine his engagement with the defendants or other his employers for the time being ; that he would not borrow or attempt to borrow any money or part with, sell, or pledge his furniture, chattels, or effects, or obtain or endeavour to obtain credit or permit any one to pledge his credit (save his wife in the case of ordinary tradesmen's books for weekly settlement), or make himself or his property answerable for any sum of money whether legally or morally ; and that he would not, without the lender's consent in writing first had and obtained, remove from his then dwelling-house or take any other dwelling-house.

*Held*, that the contract was entire and indivisible, and was bad as being contrary to public policy inasmuch as it unduly and improperly fettered the free disposal of the mortgagor s labour. HORWOOD *v.* MILLAR'S TIMBER AND TRADING CO. - - - - **Div. Ct. 44**

2. —— *Impossibility of Performance—Lighting of Streets—Supply of Gas and Lamps—Inclusive Flat Rate—Order restraining Lighting—Frustration of Adventure—Liability for Rate—Condition Precedent—Defence of Realm Regulations*, 1914.

The plaintiffs contracted with the defendants to light their district for five years from August, 1911. The plaintiffs were to provide gas standards, lamps, and other plant, to connect the same with their mains in the district, to supply gas and to light, extinguish, clean, and repair the lamps, and maintain the plant during the term. . The defendants were to pay an inclusive fixed sum per lamp per annum, payable in four equal quarterly instalments, to cover the cost of the gas and the cost of providing the necessary plant. In January, 1915, the contract having so far been performed by both parties, an Order made by the competent military authority under the Defence of the Realm Regulations, 1914, prohibited until further order the lighting of the street lamps. The plaintiffs sued for the three quarterly instalments that fell due after the date of the Order. The defendants denied their liability on the ground that the Order rendered the contract illegal and impossible of performance :—

*Held*, affirming the decision of Low J., that the defendants were liable, for the Order did not render the contract once for all wholly illegal or impossible of performance, and that the consideration for the plaintiffs' services could not be apportioned.

*Held*, also, that the supply of gas was not a condition precedent to the plaintiffs' right to recover the quarterly payments. LEISTON GAS CO. *v.* LEISTON-CUM-SIZEWELL U. D. C.
**C. A. 428**

—— Breach.
*See* SHIPPING.

**CONTRACT**—*continued.*

—— Impossibility of performance—Supervening illegality—Part performance—Quantum meruit—Shipping—Carriage by sea—Restraint of princes—Discharge at intermediate port—Freight pro rata itineris - - - - - - 624
*See* SHIPPING. 8.

—— Sale of goods—Custom of trade—Reasonableness - - - - - 296
*See* SALE OF GOODS. 2.

—— Sale of goods—"Subject to safe arrival"
*See* SALE OF GOODS. 3. 390

**CONTRACTOR**—Negligence - - - 518
*See* NEGLIGENCE. 1.

**CO-OWNER**—Copyright—Infringement - 325
*See* COPYRIGHT.

**COPYRIGHT**—*Joint Owners—Infringement by one Co-owner—Injunction—Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-s.* 1.

The plaintiff was the author of a book published by the defendants under an agreement which provided that the copyright in the book should be vested in the plaintiff and the defendants equally. The defendants subsequently, without the consent of the plaintiff, published another book, which was an infringement of the copyright in the plaintiff's book:—

*Held*, that notwithstanding that the defendants were part owners of the copyright in the plaintiff's book, the plaintiff was entitled to an injunction to restrain the defendants from infringing that copyright. CESCINSKY *v.* GEORGE ROUTLEDGE & SONS, LD. - - Rowlatt J. 325

**CORROBORATION**—Evidence—Accomplice 658
*See* CRIMINAL LAW. 3.

**COSTS**—Arbitration—Discretion of the arbitrator—Costs of successful plaintiff
*See* ARBITRATION. 1. 353

—— Arbitration—Lands Clauses Acts—Special case stated by arbitrator - - 760
*See* ARBITRATION. 2.

**COUNSEL**—Duty of, in conduct of prosecution
*See* CRIMINAL LAW. 1. 621

**COUNTY COURT**—*Default Summons — Notice of Defence given out of Time but before Judgment signed—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 86, *sub-ss.* 1, 3, 4, *and* 5.

Where a default summons under s. 86 of the County Courts Act, 1888, has been served upon a defendant under sub-s. 1, or the Court has given the plaintiff leave under sub-s. 5 to proceed as if service of it had been effected, the defendant, if he desires to defend, must give notice of defence within the eight days limited by sub-s. 1, or, in the case of an order giving the plaintiff leave to proceed without service, within the time limited by the order. Notice of defence given after the expiry of such time is too late, and the plaintiff is at liberty to sign judgment notwithstanding. REX *v.* JUDGE PARRY - - Div. Ct. 107

**COUNTY COURT**—*continued.*

2. —— *Misdirection—New Trial—Jurisdiction of County Court Judge to grant New Trial—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

After the trial of an action before a county court judge without a jury an application was made to him for a new trial. The county court judge, having come to the conclusion that at the trial he had misdirected himself, granted the application, directing the new trial to take place with a jury:—

*Held*, that the county court judge had jurisdiction to order the new trial. SANATORIUM, LD. *v.* MARSHALL - - - Div. Ct. 57

3. —— *Payment into Court with Denial of Liability—Form of Notice—Action of Negligence—Negligence admitted—Damage denied—County Court Rules*, 1903 *and* 1914, *Order* IX., *r.* 12.

The plaintiffs claimed damages in the county court for injury to their horse caused through the negligence of the defendants' servant. The defendants paid into Court under Order IX., r. 12, of the County Court Rules, 1903 and 1914, a sum of 40*l.* with the following notice: "Take notice that the defendants admit that the accident was caused through their negligence, but that they deny the alleged damage, and whilst in this manner denying liability, they bring into Court the sum of 40*l.*, and 2*l.* 9*s.* 10*d.* in respect of costs, and say that this sum is sufficient to satisfy the plaintiffs' claim":—

*Held*, that this notice was not embarrassing, but a valid and proper notice, as, although it admitted negligence, it put in issue the damage and that the horse was the property of the plaintiffs.

Decision of Divisional Court affirmed. J. R. MUNDAY, LD. *v.* LONDON C. C. - C. A. 331

4. —— *Poor Person—Practice—Plaintiff admitted to sue as Poor Person—Action of Tort—Jurisdiction to remit Action to County Court—Action "fit to be prosecuted in the High Court"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 66—*Rules of the Supreme Court, Order* XVI., *rr.* 22—31 (*I.*).

The fact that a plaintiff has been admitted to take proceedings in tort in the High Court as a poor person under Order XVI., rr. 22—31 (I.), does not take away the jurisdiction of the Court under s. 66 of the County Courts Act, 1888, to remit the action for trial in the county court.

The plaintiff obtained leave to bring an action in the High Court as a poor person against the defendants to recover damages for personal injuries from an accident caused by their alleged negligence. The plaintiff, who was a widow sixty-nine years of age, was at the time of the accident earning 7*s.* a week, and lived with her daughter, to whom she paid 2*s.* 6*d.* a week. Upon the application of the defendants under s. 66 of the County Courts Act, 1888, the judge in chambers remitted the action for trial in the county court, adding to his order that the plaintiff should be at liberty to sue as a poor person in the county court:—

*Held*, (1.), by the whole Court, that the judge had power to remit the action to the county court, but had no power to order that the plaintiff

**COUNTY COURT**—*continued.*
should be at liberty to sue in the county court as a poor person.

(2.) By Swinfen Eady and Phillimore L.JJ., that the judge had properly exercised his discretion in remitting the action; by Bankes L.J., that as the plaintiff had no means whatever and might therefore be unable to prosecute her claim in the county court, the action was more fit to be prosecuted in the High Court than in the county court, and that the judge ought to have exercised his discretion by refusing to remit the action.

*Semble, per* Phillimore L.J.: A county court judge has jurisdiction to admit a plaintiff to sue as a poor person in the county court. PERRY *v.* LONDON GENERAL OMNIBUS CO. - C. A. 335

**COUNTY COURT RULES, 1903 AND 1914,** Order IX., r. 12: J. R. MUNDAY, LD. *v.* LONDON C. C. - - - C. A. 331

**COURSING**—Rabbit - - - - 111
*See* CRIMINAL LAW. 2.

**COVENANT**——Indemnity - - - 707
*See* LANDLORD AND TENANT. 1.

—— Lease—Assignee of reversion—Right to sue for breaches—Breaches of implied obligations - - - - 91
*See* LANDLORD AND TENANT. 3.

—— Quiet enjoyment - - - - 308
*See* LANDLORD AND TENANT. 2.

**CRIMINAL LAW**—*Carnal Knowledge of Girl between Thirteen and Sixteen Years of Age—"Reasonable cause to believe" Girl Sixteen Years of Age—Duty of Counsel in Conduct of Prosecution—Criminal Law Amendment Act,* 1885 (48 & 49 *Vict. c.* 69), *s.* 5.

By s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885, any person who unlawfully carnally knows any girl of or above the age of thirteen and under the age of sixteen years is guilty of a misdemeanour. By sub-s. 2 it is provided that it shall be a sufficient defence to a charge under sub-s. 1 that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years:—

*Held,* that in order to constitute a defence under sub-s. 2 the person charged must have reasonable cause to believe, and must in fact believe, that the girl was at least sixteen years of age.

Observations as to the duty of counsel for the prosecution at a criminal trial. REX *v.* BANKS - - - - - - C. C. A. 621

2. —— *Cruelty to Animals—Rabbit Coursing in Fenced Enclosure—Impossibility of Escape—Protection of Animals Act,* 1911 (1 & 2 *Geo.* 5, *c.* 27), *s.* 1, *sub-s.* 3 (*b*).

A "rabbit coursing meeting" was held in a field of between two and a half and three acres in extent. The field was closely fenced all round with boards and wire netting. The rabbits were brought in crates and were in turn taken out and dropped upon the grass, when the dogs whose turn it was to course were slipped at a point about sixty or seventy yards distant. The rabbits, which, owing to the fence, were unable to escape, were all of them killed.

By s. 1, sub-s. 1, of the Protection of Animals Act, 1911, "If any person (*a*) . . . . shall by wantonly or unreasonably doing . . . . any act cause any unnecessary suffering . . . . to any animal," which by s. 15 is defined to mean a "domestic or captive animal," he shall be guilty of an offence.

By sub-s. 3, "Nothing in this section . . . shall apply . . . . (*b*) to the coursing or hunting of any captive animal . . . . but a captive animal shall not, for the purposes of this section, be deemed to be coursed or hunted before it is liberated for the purpose of being coursed or hunted, or after it has been recaptured, or if it is under control."

On a prosecution of an official of the meeting under sub-s. 1:—

*Held,* that, notwithstanding there was no chance of escape, there was evidence on which the magistrate could find that the chasing of the rabbits under the above circumstances was "coursing" within the meaning of sub-s. 3 (*b*), and that consequently no offence against the section had been committed.

*Per* Bray J.: The mere fact that the chasing of the animals takes place in an enclosure from which there is no possibility of escape does not prevent it from amounting to coursing, unless the space is so small as to render it impossible to test the relative coursing abilities of the competing dogs, and thereby to defeat the object of the coursing. WATERS *v.* MEAKIN - Div. Ct. 111

3. —— *Evidence—Accomplice—Corroboration—Nature of Corroboration required.*

Where on the trial of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused. REX *v.* BASKERVILLE - C. C. A. 658

4. —— *Incest—Indictment for—Conviction of Indecent Assault—Criminal Law Amendment Act,* 1885 (48 & 49 *Vict. c.* 69), *ss.* 4, 9—*Punishment of Incest Act,* 1908 (8 *Edw.* 7, *c.* 45), *s.* 4, *sub-s.* 3.

By s. 4 of the Criminal Law Amendment Act, 1885, any person who unlawfully and carnally knows any girl under the age of thirteen years is guilty of felony.

By s. 9, upon the trial of any indictment for any offence made felony by s. 4 the jury may acquit the defendant of the felony and find him guilty of an offence under (inter alia) s. 4 or of an indecent assault.

By s. 4, sub-s. 3, of the Punishment of Incest Act, 1908, on the trial of an indictment for an offence under that Act the jury may acquit the defendant of an offence under that Act and find him guilty of an offence under s. 4 of the Criminal Law Amendment Act, 1885.

The appellant was tried upon an indictment which in form charged him with incest with his daughter, a girl nine years of age. The jury

**CRIMINAL LAW**—*continued.*
acquitted him of incest, but found him guilty of indecent assault :—

*Held*, that (the indictment being for incest with a girl under the age of thirteen) the conviction was good in law, inasmuch as s. 4, sub-s. 3, of the Punishment of Incest Act, 1908, means that on the trial of a person for incest the jury may, if they think fit, convict him of an offence which is punishable under s. 4 of the Criminal Law Amendment Act, 1885, and by virtue of s. 9 of that Act indecent assault is one of those offences.

*Held*, further, that, although the indictment was in its form and terms laid under the Act of 1908, it carried with it a charge of an offence made felony under s. 4 of the Act of 1885; that therefore s. 9 of that Act applied, and the appellant was properly convicted of indecent assault. REX *v.* SIMMONITE - - - - C. C. A. 821

5. —— *Receiving Goods knowing them to have been stolen—Possession or Control—Negotiator for Sale of Goods.*

A person who negotiates for the sale of goods which he knows to have been stolen cannot be convicted of receiving the goods knowing them to have been stolen unless it is also proved that he has been in possession or control of the goods.

At the trial of a prisoner for receiving goods knowing them to have been stolen the recorder directed the jury that if the prisoner assisted to dispose of the stolen goods by negotiating for their sale he had been aiding and abetting the receivers of the goods and could be convicted of receiving the goods knowing them to have been stolen.

The jury found that the prisoner was guilty of "being a negotiator and in the full knowledge that the goods were stolen." That finding was taken by the recorder as a verdict of guilty, and he accordingly passed sentence upon the prisoner :—

*Held*, that the conviction must be quashed, inasmuch as the recorder had not directed the jury that in order to return a verdict of guilty they must find that the prisoner was in possession of the stolen property either by himself or jointly with the receivers in the sense that he had either exclusive or joint control of it and the jury by their verdict had left it in doubt whether the prisoner was in sole or joint possession of the stolen property, and whether he had possession in the sense of having control. REX *v.* WATSON C. C. A. 385

6. —— *Sentence — Evidence — Motive — Aggravating Circumstances.*

When a prisoner pleads guilty the judge may before passing sentence, in order to form an opinion as to the degree of culpability, hear evidence as to the motive which induced the prisoner to commit the offence; but where the offence is, by statute, punishable by a more severe sentence if accompanied by circumstances of aggravation, such circumstances may be taken into account in passing sentence only if they have been charged in the indictment and been proved to the satisfaction of the jury or admitted by a plea of guilty. REX *v.* BRIGHT C. C. A. 441

**CRUELTY TO ANIMALS**—Rabbit coursing in fenced enclosure — Impossibility of escape - - - - - - 111
*See* CRIMINAL LAW. 2.

**CUSTOM** — Trade — Reasonableness — Contract—Sale of goods - - - 296
*See* SALE OF GOODS. 2.

**DAMAGES**—Measure of—Principal and agent —Untrue statement negligently made by agent to principal—Loss suffered by principal - - - - - - 529
*See* PRINCIPAL AND AGENT.

**DEATH**—"Directly or indirectly" caused by war — Death caused by accident happening while assured discharging military duties - - - - 629
*See* INSURANCE (LIFE). 1.

**DECEIT**—Action of - - - - - 642
*See* HUSBAND AND WIFE.

**"DECK (ON)" RISK** - - - - 395
*See* INSURANCE (MARINE). 2.

**DECLARATION**—Action for - - - 642
*See* HUSBAND AND WIFE.

**DEED OF ARRANGEMENT** - - - 902
*See* BANKRUPTCY. 2.

**DEFAMATION** — *Libel — Publication — Letter addressed to one Person opened by another.*

One H. W. P., who contemplated purchasing a house from the plaintiff, requested his son F. W. P., with whom he was staying for a few days, to write to the defendant to make certain inquiries respecting the plaintiff. F. W. P. wrote in his own name and from his own address asking for the information in confidence. The defendant replied by a letter which arrived at F. W. P.'s house during his absence; it was opened and read by H. W. P. and was not seen or read by F. W. P. In an action by the plaintiff against the defendant in respect of alleged libellous statements in his letter the jury found that the defendant did not know or expect that his letter might probably be opened or seen by a person other than the addressee; that the defendant did not bona fide believe that what he wrote was true; that the defendant was actuated by malice in writing the letter; and they assessed the damages at 75*l.* :—

*Held*, that judgment must be entered for the defendant as there had been no publication of the libel by him. POWELL *v.* GELSTON Bray J. 615

**DEFAULT SUMMONS**—County court—Notice of defence given out of time but before judgment signed - - - 107
*See* COUNTY COURT. 1.

**DEFEASANCE**—Bill of sale - - - 302
*See* BILL OF SALE.

**DEFENCE**—Notice of—County court—Default summons - - - - - 107
*See* COUNTY COURT. 1.

**DEFENCE OF REALM REGULATIONS, 1914**: Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C. - - - C. A. 428

**DELAY** — Port of discharge — Liability of charterer - - - - - - 702
*See* Shipping. 4.

**DENIAL OF LIABILITY**—Payment into Court with—County court - - - - 331
*See* County Court. 3.

**DEPENDANT**—Illegitimate child - - 765
*See* Workmen's Compensation. 10.

**DEPORTATION.** - - - - - - 742
*See* Alien. 1.

**DEROGATION FROM GRANT** - - - 308
*See* Landlord and Tenant. 2.

**DEVIATION.**
*See* Shipping.

**"DIRECTLY OR INDIRECTLY"**—Death caused by war - - - - - - - 629
*See* Insurance (Life). 1.

**DISCHARGE**—Intermediate port - - 624
*See* Shipping. 8.

**DISCRETION**—Arbitrator—Costs - - 353
*See* Arbitration. 1.

**DRAINAGE.**
*See* Local Government.

**EMERGENCY LEGISLATION**—Alien—Deportation - - - - - - - - 742
*See* Alien. 1.

**EMPLOYER AND WORKMAN.**
*See* Workmen's Compensation.

**EMPLOYMENT.**
*See* Contract and Insurance.

**ESTOPPEL**—Charterparty—Bill of lading conclusive evidence of "quantity delivered to ship as stated therein" - - 885
*See* Shipping. 2.

**EVIDENCE**—Accident.
*See* Workmen's Compensation.

—— Accomplice - - - - - - 658
*See* Criminal Law. 3.

—— Admissibility—Sample - - - 636
*See* Adulteration. 1.

—— Licence — Renewal — Reference to compensation authority—Differentiation
*See* Licensing Acts. 126

**EXCEPTION**—Bill of lading—King's enemies—Ship sunk by German submarine—Loss of cargo—Liability of shipowner 783
*See* Shipping. 1.

—— Policy.
*See* Insurance (Life).

**EXECUTION**—Bankruptcy—Levy by sheriff—Landlord's claim for rent paid by execution creditor—Creditor's right to be recouped sum paid for rent—Duty of trustee - - - - - - 497
*See* Bankruptcy. 1.

**FINAL OR INTERLOCUTORY APPEAL** - 139
*See* Action. 2.

**FRAUDULENT REPRESENTATIONS** — Contract induced by- - - - - 482
*See* Insurance (Life). 2.

**FREIGHT PRO RATA ITINERIS** - - 624
*See* Shipping. 8.

**GAS**—Supply - - - - - - - 428
*See* Contract. 2.

**GERMAN SUBMARINE**—Ship sunk by—Loss of cargo—Liability of shipowner 783
*See* Shipping. 1.

**GOODS**—Sale of.
*See* Sale of Goods.

**GRANT**—Derogation from - - - 308
*See* Landlord and Tenant. 2.

**HABEUS CORPUS.**
*See* Alien.

**"HELD COVERED" CLAUSE** - - - 395
*See* Insurance (Marine). 2.

**HIGH COURT**—Action fit to be prosecuted in the - - - - - - - 335
*See* County Court. 4.

**HIGHWAY** — Nuisance — Sheep straying on highway—Damage to vehicle using highway - - - - - - 370
*See* Nuisance.

**HOLDING OVER**—Expiration of term - 91
*See* Landlord and Tenant. 3.

**HOTEL**—Restaurant—Shop—Shop assistant—Shops Act, 1912 - - - 27
*See* Shop.

**HUSBAND AND WIFE** — *Action by Husband against Wife—Separate Property—Proceedings for Protection and Security—Right to Maintenance—Chose in Action—Action of Deceit—Separation Deed—Action for Rescission—Restitutio in integrum—Declaration—Rules of the Supreme Court*, 1883, *Order* XXV., *r.* 5—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 12.

By s. 12 of the Married Women's Property Act, 1882, every woman, whether married before or after the Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort.

A married woman brought against her husband an action for damages for deceit, alleging that by his false and fraudulent representations

**HUSBAND AND WIFE**—*continued.*
and concealment as to his means he had induced her to enter into a deed of separation and, in accordance with its terms, to live separate upon an inadequate allowance and to abstain from claiming a judicial separation or restitution of conjugal rights and a proper allowance by way of alimony :—

*Held*, that such an action was not a remedy for the protection and security of the plaintiff's separate property within s. 12 of the Act, and that, as she was suing her husband for a tort, the action was not maintainable.

The plaintiff also claimed to have the deed rescinded and declared void :—

*Held*, that such claims were maintainable both before and since the Married Women's Property Acts, and that in claiming such relief she was not suing her husband for a tort within s. 12 of the Act of 1882.

In the circumstances of the case the Court ordered the deed to be rescinded, and made a declaration that the plaintiff was not bound by it, although since action brought the marriage had been dissolved and, except as to acts done under it, the deed had ceased to be operative. HULTON *v.* HULTON - - **Lush J. 642**

**ICE-CREAM**—Sale of—Sunday- - - **403**
*See* SUNDAY OBSERVANCE.

**ILLEGALITY**—Contract - - - **44**
*See* CONTRACT. 1.

**IMPOSSIBILITY**—Contract—Performance **428**
*See* CONTRACT. 2.

**INCEST**—Indictment—Conviction of indecent assault - - - - - **821**
*See* CRIMINAL LAW. 4.

**INDECENT ASSAULT** - - - - **821**
*See* CRIMINAL LAW. 4.

**INDEMNITY**—Covenant. - - - - **707**
*See* LANDLORD AND TENANT. 1.

—— Money-lender — Promissory note — Bona fide holder for value - - - **719**
*See* MONEY-LENDER.

**INFRINGEMENT**—Copyright - - - **325**
*See* COPYRIGHT.

**INJUNCTION** - - - - - - **325**
*See* COPYRIGHT.

**INSANITY** — Suicide — Accident—Depression—Chain of causation - - - **772**
*See* WORKMEN'S COMPENSATION. 6.

**INSTITUTE CARGO CLAUSES 4, 7** : HOOD *v.* WEST END MOTOR CAR PACKING CO. **395**

**INSURANCE (LIFE)**—*Exception in Policy—Death "directly or indirectly" caused by War—Death caused by Accident happening while Assured discharging Military Duties.*

By a policy of insurance the deceased, a military officer, was insured with the defendants against death caused accidentally within the United Kingdom by violence due to any external and visible means. The policy was subject to the condition that it did not insure against death "directly or indirectly caused by, arising from, or traceable to . . . . war." The realm being in a state of war, it became necessary to protect the South Eastern Railway, and whilst the deceased, in the course of his military duty, was walking alongside the rails of the railway for the purpose of visiting guards and sentries posted at various points along the line, he was accidentally killed by a train. The general public had no right to walk along the line at the place where the accident happened, and in normal times the place would have been illuminated by lights from an adjacent signal-box, but those lights had been obscured in compliance with regulations made under the Defence of the Realm Act, 1914. An arbitrator having found that the death of the deceased was traceable to war within the meaning of the condition :—

*Held*, that the finding of the arbitrator must be confirmed, inasmuch as the words "directly or indirectly" could not be reconciled with the maxim causa proxima non remota spectatur, which would have been applicable had the words not been in the condition ; and that, the deceased having been placed in a position of special danger by reason of his military duties consequent upon the war, it was open to the arbitrator to find as a fact that the death was indirectly caused by war. COXE *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LD. - - - **Scrutton J. 629**

2. —— *Policy on Life of Another—Absence of Insurable Interest—Contract induced by Fraudulent Representations—Recovery of Premiums paid—Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48), *s.* 1—*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *s.* 23 ; *s.* 36, *sub-s.* 3.

In 1908 and 1909 one Thomas effected with the defendants in their industrial branch five policies on the lives of others. Shortly afterwards Thomas determined not to keep the policies up, and he accordingly ceased paying the premiums and burnt the policies. At the end of 1910 one of the defendants' agents brought five duplicate policies to the plaintiff, who had no insurable interest in the lives in question, and induced her to take up the policies by the representation, which the jury found to be fraudulent, that by paying the arrears due on premiums and keeping them up everything would be all right. Thomas had not assigned the policies and did not ask for the duplicate policies, nor was he aware of what the agent was doing. The plaintiff, having discovered that the policies were illegal and void, sued to recover the premiums which she had paid :—

*Held*, that the parties were not in pari delicto, and that the plaintiff was entitled to recover, her right not being affected by ss. 23 and 36 of the Assurance Companies Act, 1909, which imposed a penalty upon a friendly society issuing such a policy.

*British Workman's and General Assurance Co.* v. *Cunliffe* (1902) 18 Times L. R. 425, 502, explained. HUGHES *v.* LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY - **C. A. 482**

**INSURANCE (MARINE)** — *Constructive Total Loss—"Restraint of Princes"—Declaration of War—"Men-of-War"—Peril of Capture—Ship putting into Neutral Port to avoid Risk of Capture—British Goods on German Ship—Loss of Adventure—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60, 62.

The plaintiffs shipped goods on board a German ship for carriage from Calcutta to Hamburg, and insured them on that voyage with the defendants against the usual perils, including men-of-war, enemies, and restraint of princes. While the goods were at sea war broke out between Great Britain and Germany, and the master on being informed of that fact put into a neutral port in order to avoid the risk of capture by hostile cruisers, and with the intention of suspending the further prosecution of the voyage until after the termination of the war, and the voyage was thereupon abandoned. The commercial venture insured being thereby destroyed, the plaintiffs gave notice of abandonment to the defendants and claimed as for a total loss. At the time that the ship put into the neutral port she had not been chased by any hostile cruiser, nor had she even sighted one, but if she had continued her voyage the peril of capture would have been great :—

*Held*—(1.) that the frustration of the venture was caused, not by the declaration of war rendering the further prosecution of the venture illegal, but by the act of the captain of the German ship putting into a neutral port and abandoning the voyage, and that therefore "restraint of princes" was not the proximate cause of the loss; and (2.) that, although to constitute a loss by capture actual capture was not necessary, the termination of the voyage by putting into a neutral port to avoid the risk of capture before the ship had gone into the zone of peril, and consequently before the peril had begun to operate, was a loss which could not be regarded as proximately caused by "men-of-war"; and that therefore the plaintiffs were not entitled to recover.

*British and Foreign Marine Insurance Co.* v. *Sanday & Co.* [1916] 1 A. C. 650 distinguished.

Judgment of Bailhache J. [1915] 3 K. B. 410 affirmed. Becker, Gray & Co. *v.* London Assurance Corporation - - **C. A. 156**

2. —— *"Held covered" Clause—Error in Description of Interest—Liberties as per Contract of Affreightment—Institute Cargo Clauses* 4, 7.

By a policy of marine insurance a motor car was insured against "all risks and breakage." The policy was in the ordinary Lloyd's form with the Institute Cargo Clauses attached, clause 4 of which provides that the assured is "Held covered, at a premium to be arranged, in case of . . . . any omission or error in the description of the interest," and clause 7 contains the words "Including all liberties as per contract of affreightment." By the terms of the bill of lading under which the car was shipped the shipowners were authorized to carry it on deck "at shipper's risk," and it was carried on deck accordingly. There was evidence that many underwriters would refuse to insure at any premium a car shipped on deck except against total loss, and that those who would be willing to insure it at all would require an unusually high premium :—

*Held*, that the assured was not protected by either of the above-mentioned clauses; that clause 4 was intended to be limited to errors of description of such a kind that if the subject-matter had been correctly described it would still have been insurable by any underwriter in the market and at a trifling increase of premium, while the "liberties as per contract of affreightment" referred to in clause 7 were confined to acts which would not materially increase the underwriters' risk, and were therefore authorized to be done without any increase of premium; and that the risk was consequently not covered by the policy. Hood *v.* West End Motor Car Packing Co. E. J. Murray, Third Party **Rowlatt J. 395**

**INSURANCE (NATIONAL HEALTH)** — *Benefits under Part I. of National Insurance Act*, 1911 *—Married Woman employed before Marriage—Temporary Unemployment on or after Marriage—Right to receive Benefits—National Insurance Act*, 1911 (1 *& 2 Geo.* 5, *c.* 55), *s.* 44, *sub-s.* 1—*Definition contained in s.* 79.

By s. 44 of the National Insurance Act, 1911, "Where a woman who has before marriage been an insured person marries, she shall be suspended from receiving the ordinary benefits under this Part" (i.e., Part I.) "of this Act until the death of her husband . . . . Provided that, where a woman who has been employed within the meaning of this Part of this Act before marriage, proves that she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed . . . ."

By the definition contained in s. 79, "For the purposes of this Part" (Part I.) "of this Act, unless the context otherwise requires . . . . A person whose normal occupation is employment within the meaning of this Part of this Act shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed . . . ." :—

*Held*, that under s. 44, sub-s. 1, a woman, who is an "insured person," on her marriage is suspended from receiving the ordinary benefits under Part I. of the Act, and she can bring herself within the proviso only by proving that she continues to be actually employed after marriage under a contract of service; and the provision in s. 79 does not affect the position of a married woman in that respect.

Decision of Atkin J. [1915] 3 K. B. 569 reversed. Davidson *v.* New Tabernacle (Old Street Congregational) Approved Society **C. A. 80**

**INSURANCE**—War risk - - - - **605**
*See* Sale of Goods. 1.

**INTERLOCUTORY ORDER** - - **139**
*See* Action. 2.

**INVITATION** — Negligence — Contract to rebuild premises—Power reserved to building owner to give special work to special tradesmen—Duty of contractor towards workmen employed by other tradesmen - - - - - 518
*See* NEGLIGENCE. 1.

**JOINT OWNERS**—Copyright - - - 325
*See* COPYRIGHT.

**JUDGMENT** — Goods sold, for price of — Judgment unsatisfied — Subsequent action against another person for price of same goods—No joint contract—Action not barred by the judgment
*See* ACTION. 2. 139

**JURISDICTION** — County court — Remitting action to - - - - - 335
*See* COUNTY COURT. 4.

—— Workmen's compensation.
*See* WORKMEN'S COMPENSATION.

**JURY** — *Trial by—Civil Cases—Separation of Jury after Summing-up—Validity of Verdict—Privy Verdict.*

The rule that any separation of the jury after the judge's summing-up in a criminal case invalidates their verdict does not apply to civil cases. In a civil action a jury stated to the associate, after the judge had left the Court one evening, that they had agreed to a verdict on two points, but could not agree on the third, and then separated for the night. Coming before the judge the next morning they gave a verdict on all three points. To this verdict they attempted to attach a condition, but the judge directed them that they could not do so, and they then withdrew the condition :—

*Held*, that the verdict was valid.

The history of the law as to separation of juries considered. FANSHAW AND ANOTHER (TRADING AS ADAMS & CO.) *v.* KNOWLES
C. A. 538

**JUSTICES**—Licence - - - - - 126
*See* LICENSING ACTS.

**KING'S ENEMIES**—Exception of—Ship—Bill of lading—Deviation—"Intermediate port"—Ship sunk by German submarine—Loss of cargo—Liability of shipowner - - - - - 783
*See* SHIPPING. 1.

**KNACKER'S YARD** - - - - 406
*See* LOCAL GOVERNMENT. 2.

**LAND**—Business, Used bona fide for any.- 553
*See* REVENUE. 2.

—— Right of support — House built over partly worked mine—Working of mine by new owner—Subsidence caused by working—Liability of mine owner 121
*See* MINE.

**LANDLORD AND TENANT**—*Alien Enemy—Lessee—Outbreak of War—Rent accrued after Outbreak of War—Right of Action—Sub-lease—Covenant of Indemnity—Third Party Notice—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Trading with the Enemy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 87), *s.* 1, *sub-s.* 2.

Where the lessee under a lease made before the outbreak of war becomes an alien enemy on the outbreak of war, his covenant in the lease to pay the rent is not thereby extinguished or suspended, and he may be sued for the rent that accrues due during the war.

If such a lessee has assigned the lease with a covenant of indemnity against his liability for the rent, his remedies are suspended whilst he is an alien enemy, so that he cannot during the war enforce his right to indemnity either by a third party notice or otherwise.

Decision of Ridley J. affirmed. HALSEY *v.* LOWENFELD. LEIGH, THIRD PARTY - C. A. 707

2. —— *Covenant for Quiet Enjoyment — Nuisance by another Tenant of same Lessor—Mock Auctions—Liability of Common Lessor—Participation—Derogation from Grant.*

A lessor is not liable in damages to his lessee under a covenant for quiet enjoyment for a nuisance caused by another of his lessees because he knows that the latter is causing the nuisance and does not himself take any steps to prevent what is being done. There must be active participation on his part to make him responsible for the nuisance. A common lessor cannot be called upon by one of his tenants to use for the benefit of that tenant all the powers he may have under agreements with other persons.

*Jaeger* v. *Mansions Consolidated* (1903) 87 L. T. 690 followed. MALZY *v.* EICHHOLZ.
C. A. 308

3. ——*Lessee holding over after Expiration of Term—Tenancy from Year to Year—Terms implied by Law in Absence of Agreement — Assignee of Reversion—Right to sue for Breaches of Covenant contained in Lease—Breaches of Implied Obligations.*

It is a question of fact in each case whether a tenant holding over on the expiration of the term granted by a lease does so upon the terms of the expired lease. If the true inference of fact is that the tenant holds over as tenant from year to year on the terms of an expired lease so far as those terms are applicable to such a tenancy, in law there is constituted a new agreement to that effect between the parties. Where a tenant holds over on the expiration of a term, and the facts do not exclude an implied agreement to hold upon the terms of the old lease, the law determines that he impliedly holds subject to all the covenants in the lease which are applicable to the new tenancy.

A tenant from year to year of a farm and buildings at a rent, who has not entered into any other express agreement with his landlord than as to the amount of the rent, is under an obligation implied by law to use and cultivate the land in a husbandlike manner, according to the custom of the country (subject to the provisions of the Agricultural Holdings Act, 1908), and to keep the buildings wind and water

**LANDLORD AND TENANT**—*continued.*
tight; and the assignee of the reversion can at common law enforce this implied obligation against the tenant.

Where, therefore, a tenant of a farm and buildings under a lease containing express covenants by him continued in occupation after the expiration of the term, the landlord and tenant agreeing that the terms of the old lease should not apply, but not agreeing upon the terms of the new tenancy except that there should be a yearly tenancy at a fixed rent, and the landlord assigned the reversion during the continuance of the tenancy, the assignee of the reversion was held entitled to sue the tenant for breaches of the above-mentioned implied obligations which occurred after the assignment of the reversion. WEDD *v.* PORTER AND OTHERS
C. A. 91

—— Rent—Execution - - - - 497
*See* BANKRUPTCY. 1.

**LANDS CLAUSES ACTS**—Arbitration—Special case stated by arbitrator—Costs of
*See* ARBITRATION. 2. 760

**LEASE.**
*See* LANDLORD AND TENANT.

**LESSOR AND LESSEE** - - - - 91
*See* LANDLORD AND TENANT. 3.

**LICENCE** — Cinematograph — Conditions of licence — Reasonable conditions — Validity of licence—Interference with contractual rights—Just cause or excuse - - - - - 504
*See* CINEMATOGRAPH.

—— Intoxicating liquors — Renewal — Reference to compensation authority — Evidence—Differentiation - - 126
*See* LICENSING ACTS.

—— Knacker's - - - - - 406
*See* LOCAL GOVERNMENT. 2.

**LICENSING ACTS** — *Licence — Renewal — Reference to Compensation Authority—Evidence—Differentiation—Licensing (Consolidation) Act,* 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c.* 24), *s.* 19.

The question of the renewal of the licence of an ante-1869 beerhouse was referred by the licensing justices to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, on the grounds that the house was unnecessary and that there was ample licensing accommodation in the district without it. Evidence was given before the compensation authority as to the situation, description, and trade of the house and of other licensed houses in the district and their number, and an ordnance plan of the locality was put in. There was no evidence that the house compared unfavourably with the other houses in the district, and there was some evidence that it was in some respects a better house than the licensed house, a beerhouse situated next to it. The compensation authority refused the renewal of the licence:—

*Held,* affirming the decision below, first, that the compensation authority was acting in a

**LICENSING ACTS**—*continued.*
judicial capacity when determining whether the licence should be refused, and could therefore only act upon legal evidence.

*Held,* further, that, although there was no evidence that the house compared unfavourably with the other houses in the district, there was evidence on which the compensation authority was entitled to refuse the renewal of the licence. COLCHESTER BREWING CO. *v.* LICENSING JUSTICES FOR TENDRING DIVISION OF ESSEX
C. A. 126

**LIEN**—Shipowners'.
*See* SHIPPING.

**LIMITATION OF LIABILITY.**
*See* SHIPPING.

**LOCAL GOVERNMENT**—*Drainage of House—Cesspool—Expense of providing—Power of Local Authority to recover—Public Health Act,* 1875 (38 *& 39 Vict. c.* 55), *s.* 23.

By s. 23 of the Public Health Act, 1875, where any house within the district of a local authority is without a drain sufficient for effectual draining, the local authority shall by written notice require the owner or occupier of the house to make a covered drain emptying into any sewer which the local authority are entitled to use and not more than 100 feet from the house; but if no such means of drainage are within that distance, then emptying into such covered cesspool or other place as the local authority direct. If the notice is not complied with the local authority may do the work required and recover in a summary manner the expenses incurred by them from the owner.

A certain house was without a drain sufficient for effectual draining, and there was no sewer within 100 feet of the house which the local authority were entitled to use:—

*Held,* that the powers of the local authority under the above section are not confined to the case where there is an available covered cesspool in existence, but that they may give notice to the owner of the house requiring him to make a covered drain emptying into a covered cesspool to be constructed, and, upon his failure to comply with the notice, may construct a covered drain and covered cesspool and recover from him the cost of so doing. CHELMSFORD CORPORATION *v.* BRADRIDGE - - - - - Div. Ct. 38

2. —— *Knacker's Yard—District Council—Licence—Appeal to Quarter Sessions from Grant or Refusal—Knackers Act,* 1786 (26 *Geo.* 3, *c.* 71), *s.* 1—*Towns Improvement Clauses Act,* 1847 (10 *& 11 Vict. c.* 34), *ss.* 125-131—*Public Health Act,* 1875 (38 *& 39 Vict. c.* 55), *s.* 169—*Public Health Acts Amendment Act,* 1890 (53 *& 54 Vict. c.* 59), *ss.* 7, 29—*Local Government Act,* 1894 (56 *& 57 Vict. c.* 73), *s.* 27.

A knacker's licence such as was formerly granted by quarter sessions under the Knackers Act, 1786, may now be granted by a district council under the Public Health Act, 1875 (which incorporates the Towns Improvement Clauses Act, 1847), and the Public Health Acts Amendment Act, 1890.

**LOCAL GOVERNMENT**—*continued.*

From the refusal of such a licence by a district council an appeal lies to quarter sessions under s. 7 of the Public Health Acts Amendment Act, 1890, notwithstanding s. 27, sub-s. 2, of the Local Government Act, 1894.

An additional licence for a knacker's yard under the Knackers Act, 1786, is not necessary. Decision of the Divisional Court affirmed. REX *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. D. C. - - - - - - - C. A. 406

**MARRIED WOMAN** — Insurance (National) — Employed before marriage—Temporary unemployment on or after marriage 80
*See* INSURANCE (NATIONAL HEALTH).

**MEASURE OF DAMAGES** — Charterparty — Breach - - - - - - 826
*See* SHIPPING. 3.

—— Principal and agent—Untrue statement negligently made by agent to principal —Loss suffered by principal - 529
*See* PRINCIPAL AND AGENT.

**MILITARY DUTIES** — Death caused by accident happening while assured discharging - - - - - - - 629
*See* INSURANCE (LIFE). 1.

**MILK.**
*See* ADULTERATION.

**MILK AND DAIRIES (CONSOLIDATION) ACT, 1915 (5 & 6 Geo. 5, c. 66)** - - 446
*See* ADULTERATION. 2.

**MINE**—*Land—Right of Support—House built over partly worked Mine—Working of Mine by new Owner—Subsidence caused by Working—Liability of Mine Owner.*

The plaintiff was the owner of a piece of land lying over a coal mine, and of a house which he built thereon in the year 1895. Prior to 1885 a large quantity of coal in the upper strata lying beneath the plaintiff's land had been excavated by the then mine owners, who, however, left pillars of coal sufficient to support the land and house of the plaintiff. In 1885 the defendant became lessee of the coal mine, the lower strata of which he worked until 1908, when his working resulted in a subsidence of the surface with resulting damage to the plaintiff's house :—

*Held*, that the defendant was liable for all the damage caused by the subsidence, including any damage that might be attributed to the condition in which the upper strata had been left by the previous owners of the mine.

*Birmingham Corporation* v. *Allen* (1877) 6 Ch. D. 284 and *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127 distinguished. MANLEY *v.* BURN - - - - C. A. 121

**MISDIRECTION**—County court—New trial—Jurisdiction of county court judge to grant new trial - - - - - 57
*See* COUNTY COURT. 2.

**MONEY-LENDER** — *Business carried on elsewhere than at Registered Address—Isolated Transaction—Avoidance of Transaction—Promissory Note—Bona fide Holder for Value—Indemnity against Money-lender—Money-lenders Acts*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *and* 1911 (1 & 2 *Geo.* 5, *c.* 38), *s.* 1, *sub-s.* 1.

By s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, a money-lender shall carry on the money-lending business at his registered address or addresses, and at no other address ; and sub-s. 2 imposes a penalty upon a money-lender who carries on business elsewhere than at his registered address.

By s. 1, sub-s. 1, of the Money-lenders Act, 1911, notwithstanding anything in s. 2 of the Money-lenders Act, 1900, any agreement with or security taken by a money-lender shall be valid in favour of any bona fide assignee or holder for value without notice of any defect due to the operation of that section ; but the money-lender shall be liable to indemnify the borrower or any other person "who is prejudiced by virtue of this enactment."

The defendant at the request of A., who was in need of money, entered into a money-lending transaction with a person who was, though the defendant did not know it, a registered money-lender, the defendant signing a promissory note for 300*l.* payable to the money-lender or order six months after date, and the money-lender giving the defendant a cheque for 200*l.* The defendant indorsed the cheque and handed it to A., who received the amount thereof. The transaction was carried out in its entirety at a place other than the registered address of the money-lender. No evidence was given of any similar transaction carried out in its entirety elsewhere than at the registered address of the money-lender. The money-lender indorsed the promissory note to a bona fide holder for value without notice, and the latter sued the defendant upon the note. The defendant paid it, and claimed indemnity from the money-lender under s. 1, sub-s. 1, of the Money-lenders Act, 1911, as having been "prejudiced by virtue of this enactment," upon the ground that the transaction was void under s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, as the money-lender in entering into it was carrying on the money-lending business elsewhere than at his registered address, and that but for the Act of 1911 the defendant would have had a defence to the plaintiff's claim :—

*Held*, (1.), by Swinfen Eady and Phillimore L.JJ. (Bankes L.J. assuming it), that, though the transaction was an isolated one, in entering into it the money-lender was carrying on the money-lending business elsewhere than at his registered address in breach of s. 2, sub-s. 1 (*b*), of the Act of 1900 ; but (2.), by Swinfen Eady and Bankes L.JJ., Phillimore L.J. dissenting, that the transaction was not thereby rendered void, and that therefore the defendant was not entitled to an indemnity.

*Kirkwood* v. *Gadd* [1910] A. C. 422 and *Whiteman* v. *Sadler* [1910] A. C. 514 considered. FINEGOLD *v.* CORNELIUS - - - C. A. 719

**NATIONAL INSURANCE.**
*See* INSURANCE (NATIONAL).

**NATIONALITY.**
*See* ALIEN.

**NATURALIZATION**—Certificate - - 476
*See* ALIEN. 2.

**NEGLIGENCE**—Action of—County court—Payment into Court with denial of liability—Form of notice—Negligence admitted—Damage denied - - 331
*See* COUNTY COURT. 3.

1. —— *Invitation—Contract to rebuild Premises—Power reserved to Building Owner to give Special Work to Special Tradesmen—Such Tradesmen declared to be Sub-Contractors employed by the Contractor—Clause that Contractor shall allow reasonable Use of any Scaffolding by other Tradesmen—Duty of Contractor towards Workmen employed by other Tradesmen.*

The defendants (called "the contractor") entered into a contract with the London County Council to remodel and enlarge a school building for a lump sum in accordance with the specification in the schedule thereto. This sum included certain sums for special work, e.g., a sum for providing and fixing hot water heating apparatus, and the County Council reserved to themselves the right to nominate special tradesmen to execute this work, in which case the fixed sum for the work was to be deducted from the contract price and to be paid direct by the County Council to the tradesmen executing the work. By a clause in the contract all specialists, merchants, tradesmen, and others executing any work or supplying any goods for the purposes of the contract who might at any time be nominated or approved by the Council were thereby declared to be sub-contractors employed by the contractor. By a clause in the specification "the contractor is to afford facilities to any other tradesman employed by the Council in the building, and to include the reasonable use of any scaffolding already erected for his own purposes, so that their work may proceed during the progress of his contract."

The County Council, under the option reserved to them, contracted with a firm of hot water engineers to provide and fix the hot water heating apparatus in the building. The defendants, in order to provide a gangway for their workmen over an opening in an upper floor of the building, laid down two planks side by side across the opening. The planks were not fastened down in any way. The plaintiff, a workman in the employment of the hot water engineers, in the course of his work was passing over the gangway when, apparently by reason of the boards slipping, he fell down the opening and was injured. In an action against the defendants to recover damages for the injuries caused, as alleged, by their negligence:—

*Held*, that the plaintiff was in the position of a person invited by the defendants to use the gangway for the purposes of his work, and that the duty of the defendants to the plaintiff was that of invitors and not that of mere licensors.

ELLIOTT *v.* C. P. ROBERTS & CO., LD.
C. A. 518

**NEGLIGENCE**—*continued.*

2. —— *Theatre—Warranty by Lessee and Manager of—Injury to Member of Audience during Performance.*

The defendant was the lessee and manager of a theatre. He had arranged for the performance of a play in his theatre with the manager of a touring theatrical company, who was to provide actors and scenery, the defendant providing the theatre, the lighting, and the playbills; each took an agreed proportion of the receipts. The plaintiff took and occupied a seat in the theatre; during the performance an actor fired a pistol, which should have contained only a blank cartridge, but in the barrel of which, by some unexplained mischance, there was also a second cartridge of smaller size, which when the pistol was fired struck the plaintiff on the wrist, inflicting a serious wound. The county court judge held that it was an implied term of the contract between the plaintiff and the defendant that all persons connected with the performance of the play should exercise reasonable care so that members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care:—

*Held*, that the implied warranty found by the county court judge was too wide, that the true relation between the plaintiff and the defendant was that of invitor and invitee, that the defendant owed the plaintiff a duty to use reasonable care that she was not exposed to unusual danger, the existence of which the defendant either knew or ought to have known, and that there must be a new trial to inquire into the supervision exercised over the firearms and the ammunition for them and into the loading of the pistols.

COX *v.* COULSON
C. A. 177

**NEW TRIAL**—County court—Misdirection—Jurisdiction of county court judge to grant new trial - - - - 57
*See* COUNTY COURT. 2.

**NOTICE**—Defence—County court—Default summons - - - - - 107
*See* COUNTY COURT. 1.

**NUISANCE**—*Highway—Sheep straying on Highway—Damage to Vehicle using Highway.*

An owner or occupier of land adjoining an ordinary highway is not bound to fence it so as to prevent harmless animals like sheep from straying upon the highway.

Although under the Highway Acts, 1836 and 1864, the owner of cattle found straying upon the highway is liable to certain penalties, he is not thereby rendered liable to an action at law.

While the plaintiffs' motor car was being driven upon a highway in the daylight at a rate of from sixteen to twenty miles an hour, the driver saw in front of him on the road a number of sheep unattended; he put on his brakes, and almost immediately thereafter two sheep, which had apparently been left behind by the others, jumped from a bank on the side of the road, and one of them ran into the car and caused it to be overturned and damaged. The sheep belonged

**NUISANCE**—*continued.*
to the defendant, who was subsequently prosecuted and fined under s. 25 of the Highway Act, 1864, for having allowed them to stray on the highway. In an action for damages in the county court the judge found that the sheep escaped on to the highway from the defendant's field through gaps in a defective hedge; that it was the natural tendency of sheep which were untended to run across or otherwise endanger vehicles in the road; that it was a matter of common knowledge that when sheep find themselves separated from the bulk of the flock they have almost a mania for rejoining it, perfectly regardless of intervening traffic; that the defendant had been guilty of negligence, or had committed a nuisance, in allowing the sheep to stray on to the highway; and that the accident was the natural consequence thereof. He accordingly gave judgment for the plaintiffs. His decision was reversed by the Divisional Court (Avory and Lush JJ.) on the ground that even assuming there was evidence of negligence or of a nuisance committed by the defendant in allowing the sheep to stray on to the highway, yet, there being no evidence of "a vicious or mischievous propensity" on the part of the sheep within the meaning of the decided cases, the accident was not the direct and natural consequence of such negligence or nuisance. The plaintiffs appealed:—
*Held*, affirming the decision of the Divisional Court [1916] 1 K. B. 206, that the defendant was under no duty to the plaintiffs as members of the public using the road to keep his sheep from straying upon it, and that the accident was not the direct and natural consequence of the breach of any such duty. HEATH'S GARAGE, LD. *v.* HODGES - - - - - - - C. A. 370

—— Tenant—Mock auctions - - - 308
*See* LANDLORD AND TENANT. 2.

**OFFICIAL ASSIGNEE**—Stock Exchange - 902
*See* BANKRUPTCY. 2.

**ORDER IN COUNCIL**—Validity of - - 742
*See* ALIEN. 1.

**PART PERFORMANCE** - - - - 624
*See* SHIPPING. 8.

**PARTICULARS**—Workmen's compensation—Amendment - - - - - 69
*See* WORKMEN'S COMPENSATION. 7.

**PAYMENT INTO COURT**—Denial of liability—County court—Form of notice—Negligence admitted—Damage denied
*See* COUNTY COURT. 3. 331

**PENALTY CLAUSE**—Limitation of liability
*See* SHIPPING. 3. 826

**PERFORMANCE**—Illegality - - - 44
*See* CONTRACT. 1.

—— Impossibility of - - - - 428
*See* CONTRACT. 2.

**PHOTOGRAPHS**—Sole right of taking - 880
*See* ACTION. 1.

**PLAINTIFF**—Successful—Costs of—Arbitration—Discretion of arbitrator - 353
*See* ARBITRATION. 1.

**POLICY.**
*See* INSURANCE.

**POOR PERSON**—Plaintiff admitted to sue as poor person—Action of tort—County court—Jurisdiction to remit action to—Action "fit to be prosecuted in the High Court" - - - - - 335
*See* COUNTY COURT. 4.

"**POSSESSION**"—Unsound food—Vendor—Rejection - - - - - 753
*See* PUBLIC HEALTH.

**POSSESSION OR CONTROL**—Negotiator for sale of goods - - - - 385
*See* CRIMINAL LAW. 5.

**PRACTICE**—County court - - - 335
*See* COUNTY COURT. 4.

—— Jury.
*See* JURY.

—— Payment into Court - - - 331
*See* COUNTY COURT. 3.

—— Poor person - - - - - 335
*See* COUNTY COURT. 4.

**PRINCIPAL AND AGENT**—*Untrue Statement negligently made by Agent to Principal—Loss suffered by Principal—Measure of Damages.*
A principal who is induced by the negligence of an agent to enter into an adventure from which loss ensues is entitled to recover from the agent the amount he has actually lost together with compensation for his loss of time. But the principal cannot add to that loss the profits which he might have made if he had had his time or money at his disposal instead of having embarked in the adventure which has miscarried. JOHNSTON *v.* BRAHAM & CAMPBELL Div. Ct. 529

**PRINCIPAL AND SURETY**—*Bond for due Performance of Contract—Arbitration Clause in Contract—Reference by Consent outside Clause—Contractor ordered to pay Costs—Liability of Surety.*
Judgment of Bailhache J. [1916] 1 K. B. 25 in favour of the defendants affirmed on the ground of the plaintiffs' departure from the original contract, the Court giving no decision upon the point of law decided by him. HOOLE U. D. C. *v.* FIDELITY AND DEPOSIT CO. OF MARYLAND - - - - - C. A. 568

**PRIVY VERDICT.**
*See* JURY.

**PROMISSORY NOTE**—Bona fide holder for value—Indemnity against money-lender. - - - - - 719
*See* MONEY-LENDER.

**PUBLIC HEALTH**—*Unsound Food—Rejection under Contract of Article supplied by Vendor—Obligation of Vendor to remove Article within Seven Days—"Possession" of Article by Vendor*

**PUBLIC HEALTH**—*continued.*
*after Rejection—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117.

By a contract made between the appellant and poor law guardians the appellant undertook to supply goods to, and deliver them at, a workhouse. The goods were, as regards quality, to be such as the guardians approved. Rejected goods were to be removed by, and at the expense of, the appellant within seven days after notice to him of their rejection. In purported fulfilment of an order given by the guardians under the contract the appellant delivered at the workhouse a quantity of rabbits which were intended for the food of man, but which were in fact unsound and unfit for the food of man. The guardians gave immediate notice of rejection to the appellant, and on the same day the rabbits were seized by an inspector of nuisances and duly condemned and ordered to be destroyed. The appellant was convicted under s. 117 of the Public Health Act, 1875, for having unlawfully deposited for the purpose of sale rabbits which were intended for the food of man and which when in his possession had been lawfully seized and condemned :—

*Held*, without deciding whether the rabbits had been deposited by the appellant for the purpose of sale, that the conviction must be quashed inasmuch as the rabbits at the time of their seizure were not in his possession within the meaning of that term in s. 117.

The word "possession" in s. 117 must be construed in a popular and not in a narrow sense. WEBB *v.* BAKER - - **Div. Ct.** 753

—— Drainage of house—Cesspool—Expense of providing—Power of local authority to recover - - - - - - 38
*See* LOCAL GOVERNMENT. 1.

**PUBLIC POLICY**—Contract — Illegality — Assignment of present and future earnings—Covenant not to leave present employment without sanction of assignee - - - - - - 44
*See* CONTRACT. 1.

**PUBLICATION** — Libel — Letter addressed to one person opened by another - 615
*See* DEFAMATION.

**QUANTUM MERUIT** - - - - 624
*See* SHIPPING. 8.

**QUARTER SESSIONS**—Appeal - - 406
*See* LOCAL GOVERNMENT. 2.

**QUIET ENJOYMENT**—Covenant for - 308
*See* LANDLORD AND TENANT. 2.

**RABBIT COURSING** — Fenced enclosure — Impossibility of escape—Cruelty to animals - - - - - - 111
*See* CRIMINAL LAW. 2.

**RAILWAY** — *Rates — Increase — Justification—Rise in Cost of Working—Improvements in Conditions of Employment—Proof—Railway and Canal Traffic Act*, 1913 (2 & 3 *Geo.* 5, *c.* 29), *s.* 1.

The Railway and Canal Traffic Act, 1913, does not impose upon railway companies seeking to justify an increase of rates the same burden of proving that the increase was reasonable as was imposed by the Railway and Canal Traffic Act, 1894.

In order to determine under s. 1 of the Act of 1913 whether a particular increase for the purpose of meeting "a rise in the cost of working the railway," resulting from improvements made by the company since August 19, 1911, in the conditions of employment of labour, is justified, the right method is to compare the actual cost of labour in connection with the goods traffic at the date of the increase complained of with what would have been the cost of that labour under the old conditions. ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) LD. *v.* GREAT NORTHERN RY. CO. **C. A.** 262

**RAILWAY AND CANAL COMMISSION** - 262
*See* RAILWAY.

**RAILWAY AND CANAL TRAFFIC ACT, 1913** 262
*See* RAILWAY.

**RATES.**
*See* RAILWAY.

**REASONABLE APPREHENSION** — "Restraints of princes" - - - 826
*See* SHIPPING. 3.

**REASONABLE CAUSE**—Workmen's compensation—Failure to make claim - 811
*See* WORKMEN'S COMPENSATION. 11.

**"REASONABLE CAUSE TO BELIEVE"** - 621
*See* CRIMINAL LAW. 1.

**REASONABLENESS**—Custom of trade - 296
*See* SALE OF GOODS. 2.

**RECEIVING GOODS KNOWING THEM TO HAVE BEEN STOLEN** — Possession or control—Negotiator for sale of goods - - - - - - 385
*See* CRIMINAL LAW. 5.

**REGISTERED ADDRESS**—Money-lender - 719
*See* MONEY-LENDER.

**REGISTRATION**—Deed of arrangement - 902
*See* BANKRUPTCY. 2.

**REMITTING ACTION TO COUNTY COURT** 335
*See* COUNTY COURT. 4.

**RENT**—Execution - - - - - - 497
*See* BANKRUPTCY. 1.

—— Outbreak of war—Alien enemy lessee 707
*See* LANDLORD AND TENANT. 1.

**RESCISSION**—Action for—Separation deed—Restitutio in integrum - - 642
*See* HUSBAND AND WIFE.

**RESTITUTIO IN INTEGRUM** - - - 642
*See* HUSBAND AND WIFE.

**"RESTRAINT OF PRINCES."**
*See* INSURANCE (MARINE) and SHIPPING.

**REVENUE**—*Income Tax—Deductions—Annual Value of Business Premises situated Abroad—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 9.

The respondents, who carried on business in London and at Singapore and Penang, claimed to deduct as an expense in arriving at the amount of their profits or gains assessable to income tax under Sched. D the annual value of the premises owned and occupied by them at Singapore and Penang for the purposes of their business :—

*Held*, that the annual value of the premises in question was a proper deduction in arriving at the respondents' profits or gains assessable to income tax under Sched. D, and that this was not affected by the fact that the premises being situated abroad were not assessable to income tax under Sched. A.

*Russell* v. *Town and County Bank* (1888) 13 App. Cas. 418 and *Usher's Wiltshire Brewery* v. *Bruce* [1915] A. C. 433 applied. STEVENS (SURVEYOR OF TAXES) *v.* E. BOUSTEAD & CO. - **560**

2. —— *Undeveloped Land Duty—Brickworks—Erection of Buildings—Land in reserve for Brick-earth—Land "used bona fide for any business"—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 16.

Land consisting of ninety-three acres was purchased between 1896 and 1899 for the purpose of brickworks. The purchaser erected buildings for that purpose costing 36,000*l.* on a portion of the land consisting of forty-nine acres. The remainder of the land was let on agreements for short terms in three plots as arable land and nursery gardens. The manufacture of bricks was carried on in the buildings and on the first-mentioned portion of the land, but in order to obtain a proper return for the capital expended on the buildings it was found that it would be necessary to continue working the brickyard for thirty years, and, therefore, that the brick-earth in the three plots which were let as arable land and nursery gardens was necessary as a reserve for the successful working of the undertaking :—

*Held*, that the three plots had not been "developed" by the erection of buildings within the meaning of s. 16, sub-s. 2, of the Finance (1909-10) Act, 1910 ; that they were "not otherwise used bona fide for any business, trade, or industry other than agriculture" within the meaning of the sub-section ; and, therefore, that they were subject to assessment to undeveloped land duty.

Principles laid down in *Inland Revenue Commissioners* v. *Devonshire* (*Duke*) [1914] 2 K. B. 627 and in *Brake* v. *Inland Revenue Commissioners* [1915] 1 K. B. 731 applied. FERGUSON *v.* INLAND REVENUE COMMISSIONERS **Atkin J. 553**

**REVERSION**—Assignee of—Right to sue for breaches of covenant contained in lease—Breaches of implied obligations *See* LANDLORD AND TENANT. 3. **91**

**RISK**—Delay to ship - - - - **610**
*See* SHIPPING. 7.

—— German submarines - - - **551, 783**
*See* SHIPPING. 1, 6.

**RULES OF THE SUPREME COURT, Order XVI.**, rr. 22—31 (I.) : PERRY *v.* LONDON GENERAL OMNIBUS CO. - **C. A. 335**

—— **Order XXV., r. 5** ; HULTON *v.* HULTON **642**

**SALE OF GOODS**—*Contract—C.i.f. Terms—Insurance against War Risk—Obligation on Seller to give Buyer Information to enable him to insure—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 32, *sub-s.* 3.

Sect. 32, sub-s. 3, of the Sale of Goods Act, 1893, provides that, "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."

*Held*, (1.) that the sub-section does not apply to a contract on c.i.f. terms entered into in time of peace, inasmuch as the contract itself provides for all the insurance that is contemplated or usual at the time when it is made ; and (2.) that the sub-section does not impose any new obligation on the seller to give notice to the buyer so as to enable him to insure against war risks if, after the date of the contract, war becomes imminent. LAW & BONAR, LD. *v.* BRITISH AMERICAN TOBACCO CO. - - **Rowlatt J. 605**

2. —— *Contract—Custom of Trade—Reasonableness.*

A trade custom is not reasonable unless it be fair and proper and such as reasonable, honest, and fair-minded men would adopt.

By a custom of the oil seed trade in the case of a contract of resale in the terms of the printed form of the Incorporated Oil Seed Association the buyers impliedly agree with their sellers to accept the original shipper's appropriation if passed on without delay, provided it was valid at the time it was made, even though at the time of being passed on the appropriation might, apart from the custom, be invalid by reason, for example, that the goods had been lost at sea : —

*Held*, that the custom was not unreasonable. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO. - - - - **Div. Ct. 296**

3. —— *Contract—"Subject to safe arrival"—Ship by which Goods to be carried not named.*

The defendants entered into a contract with the plaintiff for the sale to him of about four tons of hematine crystals "subject to safe arrival." The defendants had made a contract for the delivery to themselves of the crystals, which were expected by their vendor to arrive from Alexandria. No ship was named in the contract between the plaintiff and the defendants as that by which the crystals were to arrive. The defendants' vendor not being able to obtain delivery of the crystals was unable to supply them to the defendants, who in their turn were unable to fulfil their contract with the plaintiff :—

*Held*, that under the contract between the plaintiff and the defendants there was an obligation on the defendants to ship the goods or to get them so far under their control that they

**SALE OF GOODS**—*continued.*

were placed on board some ship; that not having done so they were not protected by the words "subject to safe arrival," which meant that provided the defendants shipped the goods they were not to be liable for non-delivery consequent upon any accident occurring to the goods in transit and preventing their safe arrival; and that the defendants were liable to the plaintiff in an action for damages for non-delivery of the crystals. BARNETT *v.* JAVERI & Co. - - **Bailhache J. 390**

4. —— *Stoppage in transitu—Vendor's Liability to Carrier for Freight—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 44, 45, 46, 47, 48, 61.

Where goods are stopped while in transit and before they reach their specified ultimate destination by notice from an unpaid vendor, the carrier is bound to act upon the notice by delivering the goods to, or according to the directions of, the vendor, and if he fails to do so he is liable to an action by the vendor for wrongful conversion.

The vendor on his part (although he is not a party to the contract of affreightment) is bound to take the goods or give directions for their delivery on arrival and to discharge the carrier's lien for freight, and if he refuses to perform this obligation he is liable in damages to the carrier for the amount of the freight.

If the conduct of a vendor who has stopped goods in transit prevents them from being carried on to their specified ultimate destination, he is liable for the freight not only in respect of the whole voyage to the place at which the goods are in fact landed, but also to the ultimate destination.

The effect of stoppage in transitu is not to rescind the contract between the carrier and the purchaser or to vest the property in the goods in the unpaid vendor.

*Pontifex* v. *Midland Ry. Co.* (1877) 3 Q. B. D. 23 observed upon.

The right of stoppage in transitu considered and explained.

Defendants, who were manufacturers in England, sold goods to the S. Company, and, acting under instructions given on behalf of that company, delivered the goods to be carried by ships of plaintiffs (who were shipowners trading from the United Kingdom to ports in Brazil) to P. in Brazil. Defendants, although the actual shippers, were not parties to the contract of affreightment with plaintiffs, as by engagements between the S. Company and plaintiffs the former were the consignees and were also treated as the shippers, and the freight was payable by them before the departure of the ship. Before the ships arrived at the port of destination defendants, hearing that the S. Company was in financial difficulties, gave certain notices to plaintiffs which admittedly amounted to a stoppage of the goods in transitu. On a voyage to P., the ocean transport ended at T., and the carriage onwards was by means of lighters, and the river was navigable by them only when the tide served, namely, two or three times a month. In the ordinary course, if the tide served, the goods were taken from the ship

**SALE OF GOODS**—*continued.*

at T. and immediately placed in the lighters for carriage to P.; but if the tide did not serve, the goods were landed by plaintiffs at C. (a small island owned by the plaintiffs in the Bay of T. in Brazil, from which P. was distant sixty miles up a river) and left there until the lighters could carry them to P. There was no bonded warehouse there capable of taking in goods of the bulk shipped in this case, but the practice was that Custom-house guards accompanied the goods to P., and in case of heavy goods, such as the goods here shipped, the duty was assessed and paid in the lighters, and the goods were then "despatched"—this term denoting the passing of the goods through the customs and the payment of the duty on them. If the goods were not sent forward at once for use they had to lie at P. in the open, but they could not be landed there unless the duty had been paid on them. On the receipt of the stopping notice, and before the ships arrived at T., plaintiffs' agents at T. signified their intention to act on the notice, and suggested that defendants should pay the freight and take up the bills of lading (which were in plaintiffs' hands) under a guarantee of indemnity to plaintiffs. Defendants declined to pay the freight. The ships having got to T., plaintiffs told defendants that they were about to land the goods forthwith for their account and asked for their specific instructions, but defendants replied declining responsibility for the landing. In further correspondence plaintiffs expressed their willingness to forward by lighter to P., but insisted that, as defendants had stopped the goods, they were liable for all attendant charges (including freight), and defendants repudiated all responsibility for these things (except expenses incurred, after landing, on their behalf), including the duty which had to be paid before the goods could be sent to P. and plaintiffs deposited the goods at C.

By the freight contract plaintiffs had a lien on the goods for unpaid freight. At the time of the trial the goods were still at C.; duty on them had not been paid; plaintiffs had not received their freight, and defendants had not got their purchase-money. Plaintiffs sought to establish and enforce a personal liability on defendants for the freight or for an equivalent amount by way of damages:—

*Held*—(1.) that defendants were liable in damages for breach of the obligation, created by their stoppage notice, to take actual possession of the goods on arrival, and to discharge plaintiffs' lien for freight; (2.) that the damages were the equivalent of proper freight; and (3.) that, as the obstacle to the continuance of the transit to P. was the repudiation of plaintiffs' liability to pay duty, freight, and expenses, the amount of damages was the total freight to P. BOOTH STEAMSHIP Co. *v.* CARGO FLEET IRON Co - - - - - - **C. A. 570**

**SALE OF MILK REGULATIONS, 1901, reg. 1:**
HUNT *v.* RICHARDSON **Div. Ct. 446**

**SALE TO PREJUDICE OF PURCHASER - 636**
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**SAMPLE**—Milk - - - - - - 636
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**SECRETARY OF STATE**—Power of to choose country to which alien shall be deported *See* ALIEN. 1. 742

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*See* SHIPPING. 6.

**SEPARATE PROPERTY** - - - - 642
*See* HUSBAND AND WIFE.

**SEPARATION**—Deed—Action for rescission—Restitutio in integrum - - 642
*See* HUSBAND AND WIFE.

—— Jury—After summing-up—Validity of verdict - - - - - - - 538
*See* JURY.

**SHEEP**—Straying on to the highway - 370
*See* NUISANCE.

**SHERIFF**—Landlord—Rent - - - 497
*See* BANKRUPTCY. 1.

**SHIPPING**—*Bill of Lading—Deviation—"Intermediate port"—Exception of King's Enemies—Ship sunk by German Submarine—Loss of Cargo—Liability of Shipowner.*

The plaintiffs were indorsees and holders of two bills of lading under which wool was shipped at Napier, New Zealand, in the defendants' steamship for carriage to London. Each bill of lading had in the margin the words "Direct service between New Zealand and London." It stated that the steamship was "now lying in the port of Napier, N.Z., and bound for London," and, after giving the fullest liberty to proceed to and stay at any ports or places in New Zealand for any purpose without any liability on the defendants on the ground of deviation, it continued: "and bound (subject to the before-mentioned liberties) on finally leaving New Zealand for London, and with liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro and/or Monte Video and/or La Plata for the purpose of taking on board coal, supplies and/or cargo and/or live stock," the goods to be delivered subject to all the above liberties to deviate and to the exceptions and conditions therein contained at the Port of London. The bills of lading contained an exception of the King's enemies. After the plaintiffs' goods were loaded on board and the bills of lading handed over a parcel of frozen meat was loaded on board for France, and the master received orders on the voyage to deliver the meat at Havre before going to London. When the steamship was about eight miles from Havre she was torpedoed by a German submarine, and she sank with her cargo. The usual and well-known course of the voyage of the defendants' line of steamships from New Zealand to London was by Cape Horn, calling at one of the three named South American ports, thence to Teneriffe or Madeira, and thence direct to London. The distance via Havre to London was fifty-four

**SHIPPING**—*continued.*

miles longer than the direct route to London, and the distance from Havre to the nearest point on the direct route to London was sixty-eight miles. No steamship of the defendants' line had ever before called at Havre. There was, however, at the time in question no greater likelihood of danger from submarine attack in going to Havre than in going to London direct. In an action by the plaintiffs to recover the value of the wool:—

*Held*, (1.) that Havre was not an "intermediate port" within the meaning of the bills of lading at which the steamship had liberty to call, that in proceeding thereto there had been a wrongful deviation from the named voyage, and that therefore the defendants could not rely upon the exception of the King's enemies in the bills of lading; (2.) that, as the defendants in deviating were breaking their contract as carriers, they could not rely upon the implied common law exception of the King's enemies, and that they were liable, not having shown that the loss must have occurred even if they had not deviated.

*Davis* v. *Garrett* (1830) 6 Bing. 716 and *Lilley* v. *Doubleday* (1881) 7 Q. B. D. 510 approved.

Judgment of Bailhache J. [1916] 1 K. B. 747 affirmed. JAMES MORRISON & Co. *v.* SHAW, SAVILL, AND ALBION CO. - - - **C. A. 783**

2. —— *Charterparty—Bill of Lading conclusive Evidence of "quantity delivered to ship as stated therein"—Estoppel.*

The sellers of timber in New Brunswick chartered the defendants' ship for the carriage of a cargo of timber to Manchester. The charterparty provided that "all responsibility of charterers hereunder ceases as soon as the cargo is alongside: . . . . Captain or agent to sign bills of lading as per surveyors' return for the cargo . . . . Bills of lading shall be conclusive evidence against the owners as establishing the quantity delivered to the ship as stated therein." The charterparty contained an exception of perils of the sea. The timber was brought down to the ship on lighters, and through rough weather a portion of it was washed overboard from the lighters and lost. The captain's agent signed bills of lading for the timber, in which the full quantity as per surveyors' return was described as "shipped on board." All the timber actually placed on board was delivered at Manchester. The plaintiffs, who were the indorsees of the bills of lading, sued the defendants for short delivery:—

*Held*, that the bills of lading estopped the defendants from denying that the full amount of cargo stated therein was shipped.

*Lishman* v. *Christie* (1887) 19 Q. B. D. 333 approved and followed.

Judgment of Bailhache J. affirmed. CROSSFIELD & Co. *v.* KYLE SHIPPING Co. - **C. A. 885**

3. —— *Charterparty — Breach — Failure to load — "Restraints of Princes" — Reasonable Apprehension—Measure of Damages—Ordinary Course of Business to insure — Penalty Clause—Limitation of Liability.*

By a charterparty, dated June 5, 1914, the defendants, who were shipowners, agreed with

SHIPPING—*continued.*
the plaintiffs to provide a steamer (name to be declared at least twenty-one days before expected date of readiness) to proceed to Marioupol, in the Sea of Azoff, and there load a cargo of 3500 tons of sulphate of ammonia, and to carry the cargo to a port in Japan and there deliver the same on being paid freight at the rate of 20*s.* per ton. The cargo was to be loaded at the average rate of 500 tons per working day, and the loading was not to commence before September 1, and the charterers had the option of cancelling the charter if the steamer was not ready to receive cargo before noon on September 20. The exceptions clause included "arrests and restraints of princes, rulers, and people," and clause 13 was as follows: "Penalty for non-performance of this agreement proved damages, not exceeding the estimated amount of freight."

On September 1 the defendants declined to name a steamer to perform the charter, giving as a reason that the British Government had prohibited steamers from going to the Black Sea to load. The Government had in fact issued no such prohibition. The plaintiffs accepted the refusal as a repudiation of the charterparty, and they were unable to charter another steamer. The Turkish Government closed the Dardanelles on September 26 or 27, 1914. If the defendants had sent a steamer in time to commence loading at Marioupol by noon on September 20 she could not have arrived at the Dardanelles on her voyage to Japan before the Dardanelles was closed. The plaintiffs had purchased the sulphate of ammonia under a contract dated April 23, 1914, and in consequence of the defendants not sending a steamer to Marioupol to load the plaintiffs failed to take up the ammonia from their sellers and had to pay them by way of compromise of their claim a sum of 4500*l.* as damages, the price of sulphate of ammonia having fallen. In an action by the plaintiffs to recover damages for breach of the charterparty in not sending a steamer to Marioupol to load:—

*Held*, that the defendants had committed a breach of contract in not sending a steamer to load, as there was at the time no existing restraint of princes, nor did a reasonable apprehension, which turned out to be well founded, that the Dardanelles would be closed before the steamer could have passed through on her voyage to Japan justify the defendants under the exception of "restraints of princes" in refusing to send a steamer to load.

*Held*, also, that, though the subsequent closing of the Dardanelles would, if the steamer had been sent to load, have prevented the cargo from being carried to Japan, the damages for the breach were substantial and not merely nominal, inasmuch as, if the cargo had been loaded, insurances, including in the circumstances an insurance against war risks, would in the ordinary course of business have been effected on the value of the cargo at the port of destination; and that the proper measure of damages was the difference between the price which would have been realized by the sale of the cargo in Japan at or about the pro-

SHIPPING—*continued.*
bable date of arrival and the current price at the port of loading at or about the date when the cargo should have been loaded, together with the freight and cost of insurance, the sum paid by the plaintiffs to their sellers not being an item in the calculation.

*Held*, further, that clause 13 of the charterparty was a penalty clause, and not a limitation of liability clause. MITSUI & Co. *v.* WATTS & Co. - - - - - - - **C. A. 826**

4. —— *Charterparty—Cesser Clause—Charterer's Liability to cease on Completion of Shipment—Shipowner's Lien—Captain to sign Bills of Lading in prescribed Form—No Lien as against Bill of Lading Holder—Liability of Charterer for Delay at Port of Discharge.*

A charterparty provided that the captain should sign bills of lading in a prescribed form without prejudice to the charterparty, that the discharge should be at a specified rate per day, that the captain should have a lien on the cargo for freight, demurrage, and any other lawful claim against the charterer, and that the charterer's liability should cease on completion of shipment provided the cargo was worth the freight and demurrage. The captain signed bills of lading in the prescribed form which did not provide for any rate of discharge and under which no lien was given to the shipowners for demurrage or other claims. The cargo was not discharged within the time provided for in the charterparty:—

*Held*, following *Clink* v. *Radford* [1891] 1 Q. B. 625 and *Hansen* v. *Harrold* [1894] 1 Q. B. 612, that the cesser clause did not exempt the charterer from liability for the delay at the port of discharge. JENNESON, TAYLOR & Co. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - - - - - **Rowlatt J. 702**

5. —— *Charterparty—Requisition by Government—"Commandeer."*

The owner of a Greek ship chartered her to the plaintiffs under a charterparty which provided that if she should be "commandeered" by the Greek Government the charterparty should be cancelled. While the ship was lying at Marseilles discharging coal for the charterers, the Greek Government on September 25, 1915, sent an order to the captain requiring him to proceed at once to Piræus for the purpose of placing the ship at their disposal if they should desire to use it. On October 11, while the ship was still at Marseilles, the Greek Government withdrew their order and released the ship:—

*Held*, that the ship had been "commandeered" and that the charterparty was cancelled.

Decision of Atkin J. [1916] 1 K. B. 439 affirmed. CAPEL *v.* SOULIDI - - **C. A. 365**

6.——*Charterparty—"Risk of seizure or capture"—Voyage involving—Risk of being attacked and sunk by German Submarines.*

A Norwegian vessel was hired for a term of five years by a charterparty, made in 1912, which provided that "no voyage be undertaken and no documents, goods, or persons shipped that would involve risk of seizur

**SHIPPING**—*continued.*

capture, repatriation, or penalty by rulers or Governments." An arbitrator found as a fact that a particular voyage would involve the risk of the vessel "being attacked and sunk by German submarines":—

*Held*, that a voyage which involved the risk of the vessel being attacked and sunk by German submarines was one which would involve risk of "seizure" or "capture" within the meaning of the charterparty. *In re* AN ARBITRATION BETWEEN TONNEVOLD AND FINN FRIIS
Scrutton J. 551

7. —— *Charterparty—Shipper's Obligation to Shipowner—Shipment of Goods by Charterer not allowed to be discharged at Port of Destination without Permission of British Government—Knowledge of Charterer of Risk of Delay to Ship—Duty to communicate Facts to Shipowner ignorant of them—Refusal by British Government of Permission to discharge—Liability of Charterer to Shipowner.*

Whatever may be the full extent of the obligation upon a shipper of goods, it amounts at least to an undertaking by him that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the shipowner facts which are within his knowledge indicating that there is the risk, provided that the shipowner does not and could not reasonably know those facts.

The shippers of a cargo of rice upon a vessel they had chartered for a voyage to Piræus knew that the rice could not be discharged there without the permission of the British Government, although they thought that they might obtain the permission. In fact they were unable to procure it, and the ship was in consequence delayed. The shipowner did not and could not reasonably have known that the permission was necessary:—

*Held*, that the delay arose from a breach by the charterers of their obligation to the shipowners, and that therefore the shipowners had a cause of action against them in respect of the delay so caused.

Judgment of Crompton J. in *Brass* v. *Maitland* (1856) 26 L. J. (Q.B.) 49, 57, followed. MITCHELL, COTTS & CO. *v.* STEEL BROTHERS & CO. - - - - - - Atkin J. 610

8. —— *Freight—Contract—Impossibility of Performance—Supervening Illegality—Part Performance—Quantum meruit—Shipping—Carriage by Sea—Restraint of Princes—Discharge at Intermediate Port—Freight pro rata itineris.*

Owners of a British ship agreed to carry goods from Tampa in Florida to Hamburg. On August 3, 1914, the ship sighted the Lizard and was warned by the Admiralty to take the goods to an English port. On the following day war was declared between the United Kingdom and the Empire of Germany, and the further prosecution of the voyage to Hamburg became illegal and impossible. The cargo was discharged at Runcorn and deposited with warehousemen subject to a lien for freight claimed by the shipowners. The owners of the cargo discharged the len, and took the goods protesting that no freight

**SHIPPING**—*continued.*

was due and never having assented to any alteration of the terms of the contract of carriage:—

*Held*, that the shipowners were not entitled to the freight, either in whole, since they had not completed the voyage, or in part, since no new contract between them and the owners of the cargo to give and take delivery at Runcorn instead of at Hamburg could be inferred.

*The Teutonia* (1871) L. R. 3 A. & E. 394; (1872) L. R. 4 P. C. 171 distinguished. ST. ENOCH SHIPPING CO. *v.* PHOSPHATE MINING CO.
Rowlatt J. 624

**SHOP** — *Hotel — Restaurant — Shop Assistant —Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *s.* 19.

By s. 19 of the Shops Act, 1912, "the expression 'shop' includes any premises where any retail trade or business is carried on; the expression 'retail trade or business' includes . . . . the sale of refreshments or intoxicating liquors . . . . the expression 'shop assistant' means any person wholly or mainly employed in a shop in connexion with the serving of customers or the receipt of orders or the despatch of goods."

The premises of a licensed hotel consisted, inter alia, of a dining-room and smoking-room, which were mainly, but not exclusively, used by residents in the hotel, and of a grill-room, which was used as a restaurant both by residents and non-residents. In the kitchen food was prepared for consumption in both the residential and non-residential parts of the hotel without reference to the particular portion of the premises in which the food was to be consumed:—

*Held*, that the grill-room was a shop within the Shops Act, 1912, and that the kitchen formed part of the shop, and that servants of the hotel who were employed entirely in the kitchen, either in the preparation of food or in the cleaning of the kitchen or the utensils, were shop assistants within the Act, but that a kitchen clerk whose duty it was to order and check the supplies of provisions was not a shop assistant.

*Melluish* v. *London County Council* [1914] 3 K. B. 325 and *Prance* v. *London County Council* [1915] 1 K. B. 688 followed.

*Held*, also, that, whether the residential part of the hotel was a shop or not, the waiters in that part of the hotel were not employed wholly or mainly in the serving of customers and were, therefore, not shop assistants.

*Per* Ridley and Bray JJ.: The residential portion of an hotel is not a shop within the Shops Act, 1912.

*Savoy Hotel Co.* v. *London County Council* [1900] 1 Q. B. 665 distinguished. GORDON HOTELS, LD. *v.* LONDON COUNTY COUNCIL. LONDON COUNTY COUNCIL *v.* GORDON HOTELS, LD. - - - - - - Div. Ct. 27

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*See* LOCAL GOVERNMENT. 1.

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*See* BANKRUPTCY. 3.

**SPECIAL CASE** — Arbitrator — Lands Clauses Acts—Costs - - - - - 760
*See* ARBITRATION. 2.

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1677.

29 Car. 2, c. 7 (Sunday Observance), ss. 1, 3: SLATER *v.* EVANS - Div. Ct. 403

1709.

8 Anne, c. 14 (or 18) (Rent), s. 1: *In re* CRAIG & SONS - - - - - - 497

1774.

14 Geo. 3, c. 48 (Life Assurance), s. 1: HUGHES *v.* LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY - - C. A. 482

1786.

26 Geo. 3, c. 71 (Knackers), s. 1: REX *v.* ESSEX JJ. *Ex parte* BARKING TOWN U. C. - - - - - - C. A. 406

1842.

5 & 6 Vict. c. 35 (Income Tax), s. 100: STEVENS *v.* E. BOUSTEAD & Co. - 560

1845.

8 & 9 Vict. c. 18 (Lands Clauses), s. 34: SIDNEY *v.* NORTH EASTERN RY. CO. - 760

1847.

10 & 11 Vict. c. 34 (Towns Improvement Clauses), ss. 125—131: REX *v.* ESSEX JJ. - - - - - C. A. 406

1853.

16 & 17 Vict. c. 34 (Income Tax), s. 2: STEVENS *v.* E. BOUSTEAD & Co. - 560

1870.

33 Vict. c. 14 (Naturalization), s. 10: JAFFÉ *v.* KEEL - - - Div. Ct. 476

1873.

36 & 37 Vict. c. 66 (Judicature), s. 24, sub-s. 3: HALSEY *v.* LOWENFELD - C. A. 707

1875.

38 & 39 Vict. c. 55 (Public Health), s. 23: CHELMSFORD CORPORATION *v.* BRADRIDGE - - - - Div. Ct. 38

—— —— ss. 116, 117: WEBB *v.* BAKER Div. Ct. 753

—— —— s. 169: REX *v.* ESSEX JJ. C. A. 406

38 & 39 Vict. c. 63 (Sale of Food and Drugs), s. 6: HUNT *v.* RICHARDSON Div. Ct. 446

1878.

41 & 42 Vict. c. 31 (Bills of Sale), s. 10, sub-s. 3: LESTER *v.* HICKLING - 302

1879.

42 & 43 Vict. c. 30 (Sale of Food and Drugs), s. 2: HUNT *v.* RICHARDSON Div. Ct. 446

1882.

45 & 46 Vict. c. 43 (Bills of Sale Act (1878) Amendment), ss. 8, 9: LESTER *v.* HICKLING - - - - - - 302

45 & 46 Vict. c. 75 (Married Women's Property), s. 12: HULTON *v.* HULTON 642

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1883.

46 & 47 Vict. c. 52 (Bankruptcy), s. 121: *In re* SALMON. *Ex parte* THE OFFICIAL RECEIVER - - - Div. Ct. 510

1885.

48 & 49 Vict. c. 69 (Criminal Law), ss. 4, 9: REX *v.* SIMMONITE - C. C. A. 821

—— —— s. 5: REX *v.* BANKS C. C. A. 621

1887.

50 & 51 Vict. c. 57 (Deeds of Arrangement), ss. 4, 5: *In re* HALSTEAD. *Ex parte* RICHARDSON - - - - 902

1888.

51 & 52 Vict. c. 43 (County Courts), s. 66: PERRY *v.* LONDON GENERAL OMNIBUS CO. - - - - - - C. A. 335

—— —— s. 86, sub-ss. 1, 3, 4, and 5: REX *v.* JUDGE PARRY - Div. Ct. 101

—— —— s. 93: SANATORIUM, LD. *v.* MARSHALL - - - - Div. Ct. 57

1889.

52 & 53 Vict. c. 49 (Arbitration), s. 24; Sched. I., par. (i.): SIDNEY *v.* NORTH EASTERN RY. CO. - - - 760

1890.

53 & 54 Vict. c. 59 (Public Health), ss. 7, 29: REX *v.* ESSEX JJ. - - C. A. 406

1893.

56 & 57 Vict. c. 71 (Sale of Goods), s. 32, sub-s. 3: LAW & BONAR, LD. *v.* BRITISH AMERICAN TOBACCO CO. 605

—— —— ss. 44, 45, 46, 47, 48, 61: BOOTH STEAMSHIP CO. *v.* CARGO FLEET IRON CO. - - - - C. A. 570

1894.

56 & 57 Vict. c. 73 (Local Government), s. 27: REX *v.* ESSEX JJ. - C. A. 406

1898.

61 & 62 Vict. c. 10 (Finance), s. 9: STEVENS *v.* E. BOUSTEAD & Co. - - - 560

1899.

62 & 63 Vict. c. 51 (Sale of Food and Drugs), s. 4, sub-s. 1: HUNT *v.* RICHARDSON Div. Ct. 446

1900.

63 & 64 Vict. c. 51 (Money-lenders), s. 2: FINEGOLD *v.* CORNELIUS - C. A. 719

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6 Edw. 7, c. 41 (Marine Insurance), ss. 60, 62: BECKER, GRAY & Co. *v.* LONDON ASSURANCE CORPORATION C. A. 156

6 Edw. 7, c. 58 (Workmen's Compensation), s. 1: LONGHURST *v.* JOHN STEWART & SON (1912), LD. - - C. A. 803

WITHERS *v.* LONDON, BRIGHTON AND SOUTH COAST RY. CO. - C. A. 772

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6 Edw. 7, c. 58, s. 1, sub-s. 1: INCE *v.* REIGATE EDUCATION COMMITTEE C. A. 671

DENNIS *v.* A. J. WHITE & Co. C. A. 1

PYPER *v.* MANCHESTER LINERS, LD. C. A. 691

SCOTT *v.* PEARSON - - C. A. 61

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—— —— s. 1, sub-s. 1; Sched. I., par. 3: JACKSON *v.* HUNSLET ENGINE CO. C. A. 8

—— —— s. 2, sub-s. 1: HARPER *v.* HARPER C. A. 811

—— —— s. 13: TAYLOR *v.* POWELL DUFFRYN STEAM COAL CO. - - C. A. 765

1908.

8 Edw. 7, c. 28 (Agricultural Holdings), Sched. II., rr. 14, 15: LORD ASHBURTON *v.* GRAY - - C. A. 353

8 Edw. 7, c. 45 (Punishment of Incest), s. 4, sub-s. 3: REX *v.* SIMMONITE C. C. A. 821

1909.

9 Edw. 7, c. 49 (Assurance Companies), s. 23: HUGHES *v.* LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY - - C. A. 482

1910.

10 Edw. 7, c. 8 (Finance (1909-10)), s. 16: FERGUSON *v.* INLAND REV. COMMRS. 553

10 Edw. 7 & 1 Geo. 5, c. 24 (Licensing (Consolidation)), s. 19: COLCHESTER BREWING CO. *v.* TENDRING DIVISION OF ESSEX LICENSING JUSTICES C. A. 126

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1 & 2 Geo. 5, c. 27 (Protection of Animals), s. 1, sub-s. 3 (*b*): WATERS *v.* MEAKIN Div. Ct. 111

1 & 2 Geo. 5, c. 38 (Money-lenders), s. 1, sub-s. 1: FINEGOLD *v.* CORNELIUS C. A. 719

1 & 2 Geo. 5, c. 46 (Copyright), s. 1, sub-s. 2; s. 2, sub-s. 1: CESCINSKY *v.* GEORGE ROUTLEDGE & SONS, LD. - - 325

1 & 2 Geo. 5, c. 55 (National Insurance), s. 44, sub-s. 1; s. 79: DAVIDSON *v.* NEW TABERNACLE (OLD STREET CONGREGATIONAL) APPROVED SOCIETY C. A. 80

1912.

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**WORKMEN'S COMPENSATION** — *Accident — Farm Servant—Injured by Accident—Contraction of Non-industrial Disease—Cattle Ringworm—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A woman employed as a farm servant to tend and feed calves contracted cattle ringworm, a contagious disease with which the calves were infected, and was thereby incapacitated for work. She claimed compensation under the Workmen's Compensation Act, 1906, on the ground that she had sustained an "injury by accident." It was admitted that the calves were infected with the disease, which was not an industrial disease within the Act. At the suggestion of the county court judge the cross-examination of the applicant and her witnesses was reserved. The judge thereupon awarded in favour of the employer on the ground that no injury by accident had been proved :—

*Held*, on appeal, that the disease might have been caused by an accident or series of accidents as in *Brintons, Ld.* v. *Turvey* [1905] A. C. 230, and that the facts had not been sufficiently ascertained for the determination of the question. If a definite time, place, and occasion could be assigned for the contracting of the disease, and if the occasion were a part, but an unusual part, of the employment, an illness so produced might be deemed an "injury by accident." The case must be remitted to the county court for further trial. SCOTT *v.* PEARSON - - - C. A. 61

2. —— *Accident — Ship's Stoker — Death from Heat-Stroke—"Injury by accident"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A seaman employed as a stoker on board a ship died from heat-stroke while going through the Red Sea. For four or five days before his death he had complained of the heat, which was admittedly excessive, and although he felt ill he continued working, being persuaded

to do so in order to lessen the strain upon his fellow-workers. On the fifth day he collapsed while at work in the stokehold, and was taken up on deck, where he died. Upon an application by his widow against the owners of the ship for compensation under the Workmen's Compensation Act, 1906 :—

*Held*, that his death was not the result of an "injury by accident" within the meaning of the Act, and that no compensation was payable.

*Ismay, Imrie & Co.* v. *Williamson* [1908] A. C. 437 ; *Maskery* v. *Lancashire Shipping Co.* (1914) 7 B. W. C. C. 428 ; *Morgan* v. *Owners of S.S. Zenaida* (1909) 2 B. W. C. C. 19 ; *Sheerin* v. *Clayton & Co.* [1910] 2 I. R. 105 ; and *Brintons, Ld.* v. *Turvey* [1905] A. C. 230, distinguished. PYPER *v.* THE MANCHESTER LINERS, LD.
C. A. 691

3. —— *Accident arising out of Employment—Street Risk—Visiting Nurse—Direction by Employers to use Bicycle—Bicycle Accident—Abnormal Risk—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The applicant was employed as a visiting nurse by an education committee to visit children at their homes and was required by her employers to ride a bicycle provided by them for that purpose. Her duties necessitated her riding her bicycle from six to ten miles every day along one or other of the roads in her district, and the number of cases she visited averaged about 120 a month. Each visit usually occupied only a few minutes. On leaving a house where she had been visiting a child, in attempting to cycle round a cart and horse which were standing across the road her bicycle "skidded" and one of the wheels became locked in the back wheel of a passing car, and she was thrown to the ground and seriously injured. The district in which the applicant's work lay was a residential rural district, and the road was an ordinary water-bound macadam road in fairly good condition :—

*Held*, that the accident did not arise out of the employment inasmuch as the applicant had failed to prove that it exposed her to exceptional risks beyond those to which ordinary bicycle riders were exposed.

*Read* v. *Baker* [1916] 1 K. B. 927 and *Dennis* v. *A. J. White & Co.* [1916] 2 K. B. 1 followed.

*Pierce* v. *Provident Clothing and Supply Co.* [1911] 1 K. B. 997 distinguished.

The difference in the views taken by the English and Scottish Courts with regard to the risks incurred by a workman where in the course of his employment he is required to ride a bicycle observed upon. INCE *v.* REIGATE EDUCATION COMMITTEE - - - - - - C. A. 671

4. —— *Accident arising out of and in Course of Employment—Street Risk—Workman directed to ride Bicycle on Employers' Business—Special Danger—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Where a workman in the course of his employment was required to ride a bicycle belonging to his employers through the streets of London on an average once a day, and while so doing was knocked down and injured by a motor car :—

*Held* by Lord Cozens-Hardy M.R. and Phillimore L.J., Sargant J. dissenting, (1.) that the accident did not arise out of the employment but was something which might happen to any ordinary member of the public riding a bicyle in the streets, and (2.) that the question whether the accident did or did not arise out of the employment was one of fact upon which the decision of the county court judge was final. DENNIS *v.* A. J. WHITE & Co. - - - - - C. A. 1

5. —— *Accident arising out of and in the Course of the Employment—Work on Ship lying in Dock—Transit from Ship to Shore—Accident in Dock on Way Home—No Right of Workman to be in Dock except by Virtue of his Contract of Employment—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A carpenter was employed on a barge lying in a dock, and at night, when his work was finished, started to walk along the quay to the gates of the dock, but fell off the quay and was drowned. The dock was private property, and his employers had leave from the dock owners to authorize their workmen to use this means of access. The public had no right to enter the docks :—

*Held*, that, inasmuch as the workman had no right to be upon the dock premises except by virtue of his employment, the accident did arise out of and in the course of the employment. LONGHURST *v.* JOHN STEWART & SON (1912), LD. PORT OF LONDON AUTHORITY, THIRD PARTIES
C. A. 803

6. —— *Accident — Evidence — Depression — Insanity — Suicide — Chain of Causation — Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

In order to show that suicide has been caused by injury resulting from accident so as to give a claim for compensation it is necessary to prove that the suicide was caused by insanity and that the insanity was the direct result of the accident, not an indirect result caused by brooding over the accident ; and for this purpose the difference between legal and medical insanity is immaterial.

A workman met with an accident and his recovery was slow ; he became depressed and melancholic through absence of work and committed suicide. The judge held that there was evidence of insanity from a medical but not from a legal point of view, and that the evidence did not prove that the insanity was caused by the accident ; and he refused to award compensation.

*Held*, that, in the absence of evidence of injury to the brain or that the accident was the cause of the mental symptoms, the award was justified.

The difference between legal and medical insanity is not a sound distinction to be relied on in such a case.

*Malone* v. *Cayzer, Irvine & Co.* (1908) 1 B W. C. C. 27 followed. WITHERS *v.* LONDON, BRIGHTON, AND SOUTH COAST RY. CO. C. A. 772

7. —— *Arbitration—Particulars—Nature of Injury—Allegation of further Independent Injury*

**WORKMEN'S COMPENSATION**—*continued.*

—*Amendment of Particulars—Jurisdiction—Appeal—Right to raise Points of Law not made at Hearing—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Upon an appeal from an award in an arbitration under the Workmen's Compensation Act, 1906, points of law not taken at the hearing before the county court judge cannot be raised in the Court of Appeal.

*Payne* v. *Clifton* (1910) 3 B. W. C. C. 439 and *Harlock* v. *Owners of the Coquet* (1914) 7 B. W. C. C. 88, 90, followed.

A workman claimed compensation in respect of an injury by accident arising out of and in the course of his employment and in the particulars of his claim described the nature of the injury as "rupture." The employers had paid compensation for eight months and then offered the man light work and reduced compensation. He refused this offer and commenced the proceedings for arbitration. At the hearing he further complained of an injury to his back, of which no notice had been given to the employer. The medical evidence proved that the alleged injury to the back was independent of, and not causally connected with, the rupture. The county court judge, having heard the evidence, held that the workman was only entitled to a declaration of liability in respect of the rupture, and to this the employers were willing to submit. The applicant then asked for leave to amend his particulars so as to enable him to claim in respect of the injury to the back. The employers objected that as, prior to the arbitration, no dispute had arisen as to the alleged injury to the back, the county court judge could not allow an amendment in respect of a matter as to which he had no jurisdiction to make an award. The county court judge upheld the objection and refused to allow the amendment:—

*Held*, that his decision was right. STEVENS *v.* THORNE & CO. - - - - - C. A. 69

8. —— *Compensation — Basis of Calculation —"Average weekly earnings"—Earnings varying according to Season—Shortness of Period of Employment—Scaffolder—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58,) *Sched. I., pars.* 1 (*b*) *and* 2 (*a*).

The applicant was employed by the respondents as a scaffolder at a wage of 8½*d.* an hour. On January 27, 1916, he met with an accident arising out of and in the course of his employment and was totally incapacitated. At the time of the accident he had been in the employment of the respondents for seven weeks, and his average weekly earnings during that period amounted to 1*l.* 7*s.* 8½*d.* There was evidence that scaffolders were usually employed for short periods only by different employers, but that they could generally obtain employment throughout the whole year. They worked longer hours in summer than in winter and consequently earned more money. The applicant estimated his average weekly earnings for a year at 1*l.* 15*s.* 10*d.* The county court judge held that, having regard to the shortness of the time during which the applicant had been in the respondents' employment and to the fact that

**WORKMEN'S COMPENSATION**—*continued.*

the weekly earnings varied in summer and winter, it was impracticable within the proviso to par. 2 (*a*) of Sched I. to the Workmen's Compensation Act, 1906, to compute fairly the rate of the applicant's remuneration by reference to his earnings during the seven weeks' employment, and he accordingly awarded compensation at the rate of 17*s.* 11*d.* a week by reference to the average weekly earnings of a person in the same grade employed in the same class of employment and in the same district:—

*Held*, that the words "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated" at the beginning of par. 2 (*a*) were the dominant guiding words of the paragraph and were quite sufficient to justify the county court judge in adopting the course he did.

*Perry* v. *Wright* [1908] 1 K. B. 441 and *Carter* v. *John Lang & Sons*, 1908 S. C. 1198 applied.

*Godden* v. *W. Cowlin & Son* [1913] 1 K. B. 590 explained. COX *v.* GEORGE TROLLOPE & SONS - - - - - - - C. A. 682

9. —— *Compensation — Review — Termination—Incapacity—Loss of Eye—Suitable Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58,) *s.* 1, *sub-s.* 1; *Sched. I., par.* 3.

The employers of a man who had lost an eye by accident arising out of and in the course of his employment in their service alleged that his incapacity had terminated, and they ceased to pay compensation to him. He applied for compensation, and the employers offered a suspensory award. The county court judge was of opinion that the incapacity had terminated and refused to make any award. The Court of Appeal sent the matter back to the judge to make an award and to consider for this purpose whether the work offered to the applicant by the employers was suitable. The judge held, on the ground, inter alia, of the unusual risk which would be run by a one-eyed man, that the offered employment was not suitable and awarded full compensation:—

*Held*, on appeal, that suitability was a question of fact; that there was sufficient evidence to justify the finding that the work was not suitable without reference to the extra risk; and (*semble*) under the direction given in the first appeal that the learned judge was right in taking the extra risk run by a one-eyed man into consideration. JACKSON *v.* HUNSLET ENGINE CO. - - - C. A. 8

10. ——*Dependant—Total or partial—Illegitimate Child—War Office Separation Allowance—Common Fund—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

A woman who had been deserted by her husband went with her three children by him to live with another man, by whom she had an illegitimate child. This man earned 45*s.* a week, which he paid to her and which she applied in the maintenance of the household. Her husband subsequently joined the Army, and she then received from the War Office a

**WORKMEN'S COMPENSATION**—*continued.*

separation allowance of 23*s.* a week. The man with whom she was living was killed by an accident arising out of and in the course of his employment by the respondents. Upon an application by his infant illegitimate child for compensation under the Workmen's Compensation Act, 1906 :—

*Held*, in the absence of evidence that the mother of the applicant placed any part of her separation allowance to a common fund for the maintenance of the family, that the applicant was totally dependent upon her father and entitled to compensation upon that footing. TAYLOR *v.* POWELL DUFFRYN STEAM COAL CO. **C. A. 765**

11. —— *Seaman—Injury by Accident—Notice of Claim—Release under the Merchant Shipping Act*, 1894—*Exception from Release of Claim under Workmen's Compensation Act—Receipt by Workman of Payments from Managing Owner during Four Years—Subsequent Claim against Master—Failure to give Notice of Claim within Six Months of Occurrence of Accident—Reasonable Cause—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1.

A seaman met with an accident on board ship while at sea and was incapacitated thereby. On reaching port he signed the usual form of release under the Merchant Shipping Act, 1894, from all claims for wages or otherwise in respect of the voyage, but by a note on the back of the form he excepted therefrom any claim under the Workmen's Compensation Act, 1906 :—

*Held*, that this did not operate as a notice of claim under the Act.

The ship was worked on the "thirds" system, under which the master took two thirds of the gross profits, making certain payments and engaging the crew, while the owners took the remaining third. The master knew of the accident and told the workman, who was his brother, to apply to the managing owner, which he did, and for a period of four years from the accident he received from him weekly payments which were made ex gratia and without any acknowledgment of liability. The owner having ceased to make the payments, the workman commenced proceedings for compensation against the master :—

*Held*, that there was "reasonable cause" within s. 2, sub-s. 1 (*b*), of the Act for his failure to make a claim against the master within six months from the occurrence of the accident, and consequently that the proceedings were maintainable. HARPER *v.* HARPER **C. A. 811**

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